

# 13e American Government

Institutions & Policies

Brief Version



James Q. Wilson

John J. Dilulio, Jr.

Meena Bose

Matthew Levendusky

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Government**  
**Institutions & Policies**

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**James Q. Wilson**

*University of California, Los Angeles, emeritus  
Pepperdine University  
Boston College*

**John J. Dilulio, Jr.**

*University of Pennsylvania*

**Meena Bose**

*Hofstra University*

**Matthew Levendusky**

*University of Pennsylvania*



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*Australia • Brazil • Mexico • Singapore • United Kingdom • United States*

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**Brief Version**

**James Q. Wilson, John J. Dilulio, Jr.,  
Meena Bose, Matthew Levendusky**

Product Director: Paul Banks

Product Manager: Bradley Potthoff

Project Manager: Julia Giannotti

Content Development Project Manager:  
Andrea Stefanowicz, Lumina  
Datamatics, Inc.

Product Assistant: Staci Eckenroth

Marketing Manager: Valerie Hartman

Content Project Manager: Cathy Brooks

Art Director: Sarah Cole

Manufacturing Planner: Fola Orekoya

IP Analyst: Alexandra Ricciardi

IP Project Manager: Betsy Hathaway

Production Service and Compositor:  
SPi Global

Text and Cover Designer: Studio Montage

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# Letter to Instructors

Dear American Government Instructor:

We wrote *American Government: Institutions and Policies, Brief Version* 13e not only to explain to students how the federal government works, but to clarify how its institutions have developed over time and describe their effects on public policy. Within this distinguishing framework we explain the history of Congress, the presidency, the judiciary, and the bureaucracy, because the politics we see today are different from those of a few decades ago. Likewise, we explain how public opinion, elections, interest groups, and the media shape and contribute to policy, and how that influence has evolved over time.

*American Government: Institutions and Policies, Brief Version*, 13e is written around certain key ideas—the U.S. Constitution, America’s adversarial political culture, and a commitment to freedom and limited government—that help students understand not only American government, but the reasons why the government in this country is different from those in other democracies. This book is an attempt to explain and give the historical and practical reasons for these differences.

## New to This Edition

As always, the book is thoroughly revised to excite students’ interest about the latest in American politics and to encourage critical thinking. Updates reflect the latest scholarship and current events, including 2015 Supreme Court rulings on gay marriage and health care; the 2014 and 2016 elections; ongoing debates about the federal budget, immigration, taxes, and other key issues in American politics; and foreign-policy decisions on Iran, Russia, and Syria. Reworked Learning Objectives open, organize, and close each chapter, serving as a road map to key concepts and helping students assess their comprehension. Each chapter now contains a “Constitutional Connections” box to help students connect the topic to the nation’s founding. More visual aids are included throughout, including infographics in the appendix, new figures, and a striking new design.

We are also excited that Matthew S. Levendusky of the University of Pennsylvania joins us as a new coauthor. Matt’s expertise in areas including political polarization and the mass media, public opinion, and campaigns and elections has been a great asset to this edition.

## Instructor Companion Site

The Instructor Companion Site is an all-in-one multimedia online resource for class preparation, presentation, and testing. Accessible through Cengage.com with your faculty account, you will find available for download: book-specific Microsoft PowerPoint presentations, a Test Bank compatible with multiple learning management systems, and an Instructor’s Manual.

The Test Bank—Cengage Learning Testing Powered by Cognero—offers Blackboard, Moodle, Desire2Learn, Canvas and Angel formats, and contains learning objective-specific multiple-choice and essay questions for each chapter. Import the test bank into your LMS to edit, manage, or write your own questions, and to create tests.

The Instructor’s Manual contains chapter-specific learning objectives, an outline, key terms with definitions, and a chapter summary. Additionally, the Instructor’s Manual features a critical-thinking question, lecture launching suggestion, and an in-class activity for each learning objective.

The Microsoft PowerPoint presentations are ready-to-use, visual outlines of each chapter. These presentations are customized easily for your lectures. All content can be accessed through cengage.com, with your faculty account.

We hope this book helps your students grapple with the fundamental questions of American government, and understand who governs and to what ends. And we hope it inspires them to continue engaging with the exciting, dynamic world of American politics.

Sincerely,

John J. Dilulio, Jr.

Meena Bose  
Meena.Bose@hofstra.edu

Matthew S. Levendusky  
mleven@sas.upenn.edu

# Letter To Students

Dear Student:

Welcome to *American Government: Institutions and Policies, Brief Version*, 13e! We wrote this textbook to help you grapple with two of the fundamental questions of American government and politics: who governs, and to what ends? The textbook will help you to answer these questions, and to better understand how the structure of American government determines the policies that we see. The material we include—from Learning Objectives to features such as Constitutional Connections—will help you master key concepts and topics, and apply them from the classroom to everyday political life.

- **Learning Objectives** open and close each chapter, serving as a road map to the book's key concepts and helping you to assess your understanding.
- **Now and Then** chapter-opening vignettes explore a particular topic in the past and in the present, reinforcing the historical emphasis of the text and applying these experiences to the world around you today.
- **Constitutional Connections** features raise analytical issues from the constitutional debates that remain relevant today.
- **Landmark Cases** provide brief descriptions of important Supreme Court cases.
- **How We Compare** features show how other nations around the world structure their governments and policies, and ask you to think about the consequences of these differences with American democracy.
- **To Learn More** sections close each chapter with carefully selected Web resources and classic and contemporary suggested readings to further assist you in learning about American politics.

We hope all of these resources help you to master the material in the course and gain a richer understanding of American government and democracy. We also hope that this textbook encourages you to continue your intellectual journey in American politics, and that understanding how the political process functions will inspire you to become involved in some way. How will you shape who governs, and to what ends?

Sincerely,

John J. Dilulio, Jr.

Meena Bose  
Meena.Bose@hofstra.edu

Matthew S. Levendusky  
mleven@sas.upenn.edu





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Gayle Randolph, <i>Neosho County Community College</i>	Richard Grubbs, <i>R.L. Paschal High School</i>
Glenn David Garrison, <i>Collin County Community College–Spring Creek Campus</i>	Dr. Robert Carroll, <i>East-West University</i>
Greg Rabb, <i>Jamestown Community College</i>	Roger Ashby, <i>Peace College</i>
Greg Snoad, <i>Mauldin High School</i>	P. S. Ruckman, <i>Rock Valley College</i>
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Jack Citrin, <i>University of California, Berkeley</i>	Teddy Davis, <i>Arkansas State University–Beebe</i>
James Brent, <i>Arkansas State University–Beebe</i>	Teresa Wright, <i>California State University–Long Beach</i>
Jeff Harmon, <i>University of Texas at San Antonio</i>	Terri Fine, <i>University of Central Florida</i>
Jenna P. Duke, <i>Lehigh Carbon Community College</i>	Vanessa Lal, <i>Adlai E. Stevenson High School</i>
Jennifer Walsh, <i>Azusa Pacific University</i>	Virgil H. Davis, <i>Pellissippi State Community College</i>
Jonathan Roberts, <i>Portland, Oregon, schools</i>	William Lester, <i>Jacksonville State University</i>
Junius H. Koonce, <i>Edgecombe Community College</i>	Young-Choul Kim, <i>University of Evansville</i>
Kathleen C. Hauger, <i>Abington Senior High School</i>	Zach Courser, <i>Boston College</i>

# About the Authors

## James Q. Wilson

James Q. Wilson most recently taught at Boston College and Pepperdine University. He was Professor Emeritus of Management and Public Administration at the University of California Los Angeles and was previously Shattuck Professor of Government at Harvard University. He had written more than a dozen books on the subjects of public policy, bureaucracy, and political philosophy. Dr. Wilson was president of the American Political Science Association (APSA), and he is the only political scientist to win three of the four lifetime achievement awards presented by the APSA. He received the Presidential Medal of Freedom, the nation's highest civilian award, in 2003. Dr. Wilson passed away in March 2012 after battling cancer. His work helped shape the field of political science in the United States. His many years of service to his *American Government* book remain evident on every page and will continue for many editions to come.

## John J. Dilulio, Jr.

John J. Dilulio, Jr. is a Professor of Political Science at the University of Pennsylvania and has won each of Penn's most prestigious teaching awards. He was previously Professor of Politics and Public Affairs at Princeton University. Dr. Dilulio received his Ph.D. in Political Science from Harvard University. He has been a senior fellow and directed research programs at several leading think tanks, including the Brookings Institution, and has won awards from the Association of Public Policy Analysis and Management, the APSA, and other bodies. Dr. Dilulio has advised presidential candidates in both parties, served on bipartisan government reform commissions, and worked as a senior staff member in the White House.

## Meena Bose

Meena Bose is director of the Peter S. Kalikow Center for the Study of the American Presidency, Peter S. Kalikow Chair in Presidential Studies, and Professor of Political Science at Hofstra University. She received her Ph.D. (1996) from Princeton University. Dr. Bose teaches such courses as American Presidency, Presidential Leadership and Policy Making, and American Politics. She is the author or editor of several volumes in presidency studies and American politics. Dr. Bose taught for six years at the United States Military Academy at West Point.

## Matthew S. Levendusky

Matthew S. Levendusky is Associate Professor of Political Science at the University of Pennsylvania. He received his Ph.D. from Stanford University (2006). Dr. Levendusky teaches courses in public opinion, campaigns and elections, policymaking, and political polarization. He has written two books on political polarization and the mass media, both published with the University of Chicago Press.

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## CHAPTER 1

# The Study of American Government

### LEARNING OBJECTIVES

- 1-1** Explain how politics drives democracy.
- 1-2** Discuss five views of how political power is distributed in the United States.
- 1-3** Explain why “who governs?” and “to what ends?” are fundamental questions in American politics.
- 1-4** Summarize the key concepts for classifying the politics of different policy issues.

**issue** A conflict, real or apparent, between the interests, ideas, or beliefs of different citizens.

**politics** The activity by which an issue is agitated or settled.

Today, Americans and their elected leaders are hotly debating the federal government's fiscal responsibilities, for both spending and taxation.

Some things never change.

## THEN

In 1786, a committee of Congress reported that since the Articles of Confederation were

adopted in 1781, the state governments had paid only about one-seventh of the monies requisitioned by the federal government. The federal government was broke and sinking deeper into debt, including debt owed to foreign governments. Several states had financial crises, too.

In 1788, the proposed Constitution's chief architect, James Madison, argued that while the federal government needed its own "power of taxation" and "collectors of revenue," its overall powers would remain "few and defined" and its taxing power would be used sparingly.<sup>1</sup> In reply, critics of the proposed Constitution—including the famous patriot Patrick Henry—mocked Madison's view and predicted that if the Constitution were ratified, there would over time be "an immense increase of taxes" spent by an ever-growing federal government.<sup>2</sup>

## NOW

The federal budget initially proposed for 2016 called for spending almost \$4 trillion, with close to a \$500 billion deficit (i.e., spending nearly half a trillion more than projected government revenues). An expected national debt of more than \$19 trillion, much of it borrowed from foreign nations, was projected to balloon to \$26 trillion by 2025. Projected interest on the national debt in 2016 would be nearly \$300 billion, and was expected to triple by 2025.<sup>3</sup>

The Budget Control Act of 2011 had called for long-term deficit reduction, but when the White House and Congress could not reach agreement in 2013, automatic spending cuts—known as "sequestration"—went into effect, and the federal government even shut down for 16 days in October 2013. The two branches ultimately produced the Bipartisan Budget Act of 2013, but could not find common ground on questions about long-term revenue and spending goals.

So, in the 1780s, as in the 2010s, nearly everyone agreed that government's finances were a huge mess and that bold action was required, and soon; but in each case, then and now, there was no consensus about what action to take, or when.

## 1-1 Politics and Democracy

This might seem odd. After all, it may appear that the government's financial problems, including big budget deficits and revenue shortfalls, could be solved by simple arithmetic: either spend and borrow less, or tax more, or both. But now ask: Spend or borrow less for what, and raise taxes on whom, when, how, and by how much?

For example, should we cut the defense budget but continue to fund health care programs, or the reverse? Or should we keep defense and health care funding at current levels, but reduce spending on environmental protection or homeland security? Should we perhaps increase taxes on the wealthy (define *wealthy*) and cut taxes for the middle class (define *middle class*), or ... what?

Then, as now, the fundamental government finance problems were *political*, not mathematical. People disagreed not only over how much the federal government should tax and spend, but also over whether it should involve itself at all in various endeavors. For example, in 2011, the federal government nearly shut down—not mainly over disagreements between the two parties about how much needed to be cut from the federal budget (in the end, the agreed-to cuts totaled \$38.5 billion), but primarily over whether any federal funding at all should go to certain relatively small-budget federal health, environmental, and other programs.

Fights over taxes and government finances; battles over abortion, school prayer, and gay rights; disputes about where to store nuclear waste; competing plans on immigration, international trade, welfare reform, environmental protection, or gun control; and contention surrounding a new health care proposal. Some of these matters are mainly about money and economic interests. Others are more about ideas and personal beliefs. Some people care a lot about at least some of these matters; others seem to care little or not at all.

Regardless, all such matters and countless others have this in common: each is an **issue**, defined as a conflict, real or apparent, between the interests, ideas, or beliefs of different citizens.<sup>4</sup>

An issue may be more apparent than real. For example, people might fight over two tax plans that, despite superficial differences, would actually distribute tax burdens on different groups in exactly the same way. Or an issue may be as real as it seems to the conflicting parties, as, for example, it is in matters that pose clear-cut choices (e.g., high tariffs or no tariffs; abortion legal in all cases or illegal in all cases).

And an issue might be more about conflicts over means than over ends. For example, on health care reform or other issues, legislators who are in the same party and have similar ideological leanings (like a group of liberal Democrats, or a group of conservative Republicans) might agree on objectives but still wrangle bitterly with each other over different means of achieving their goals. Or, they might agree on both ends and means but differ over priorities (which goals to pursue first), timing (when to proceed), or tactics (how to proceed).

Whatever form issues take, they are the raw materials of politics. By **politics** we mean "the activity—negotiation, argument, discussion, application of force, persuasion, etc.—by which an issue is agitated or settled."<sup>5</sup> There are many different ways that any given issue can be agitated (brought to attention, stimulate conflict) or settled (brought to an accommodation, stimulate consensus). And there are many different ways that government can agitate or settle, foster or frustrate political conflict.



As you begin this textbook, this is a good time to ask yourself which issues matter to you. Do you care a lot, a little, or not at all about economic issues, social issues, or issues involving foreign policy or military affairs? Do you follow any ongoing debates on issues such as tightening gun control laws, expanding health care insurance, regulating immigration, or funding antipoverty programs?

As you will learn in Part II of this textbook, some citizens are quite issue-oriented and politically active. They vote and try to influence others to vote likewise; they join political campaigns or give money to candidates; they stay informed about diverse issues, sign petitions, advocate for new laws, or communicate with elected leaders; and more.

But such politically attentive and engaged citizens are the exception to the rule, most especially among young adult citizens under age 30. According to many experts, ever more young Americans are closer to being “political dropouts” than they are to being “engaged citizens”—a fact that is made no less troubling by similar trends in the United Kingdom, Canada, Scandinavia, and elsewhere.<sup>6</sup> Many high school and college students believe getting “involved in our democracy” means volunteering for community service, but not voting.<sup>7</sup> Most young Americans do not regularly read or closely follow political news; most know little about how government works and exhibit no “regular interest in politics.”<sup>8</sup> In response to such concerns, various analysts and study commissions have made proposals ranging from compulsory voting to enhanced “civic education” in high schools.<sup>9</sup>

The fact that you are reading this textbook tells us that you probably have some interest in American politics and government. Our goal is to develop, enliven, and inform that interest by examining concepts, interests, and institutions in American politics from a historical perspective as well as through current policy debates.

## Power, Authority, and Legitimacy

Politics, and the processes by which issues are normally agitated or settled, involves the exercise of power. By **power**, we mean the ability of one person to get another person to act in accordance with the first person’s intentions. Sometimes an exercise of power is obvious, as when the president tells the Air Force that it cannot build a new bomber, or orders soldiers into combat in a foreign land. Other times an exercise of power is subtle, as when the president’s junior speechwriters, reflecting their own evolving views, adopt a new tone when writing about controversial issues such as education policy. The speechwriters may not think they are using power—after all, they are the president’s subordinates and may see their boss face to face infrequently. But if the president speaks the phrases that they craft, then they have used power.

Power is found in all human relationships, but we are concerned here only with power as it is used to affect who will hold government office and how government will behave. We limit our view here to government, and chiefly to the American federal government. However, we pay special attention repeatedly to how things once thought to be “private” matters become “public”—that is, how they manage

to become objects of governmental action. Indeed, as we discuss more later, one of the most striking transformations of American politics has been the extent to which, in recent decades, almost every aspect of human life has found its way onto the political agenda.

People who exercise political power may or may not have the authority to do so. By **authority** we mean the right to use power. The exercise of rightful power—that is, of authority—is ordinarily easier than the exercise of power not supported by any persuasive claim of right. We accept decisions, often without question, if they are made by people who we believe have the right to make them; we may bow to naked power because we cannot resist it, but by our recalcitrance or our resentment we put the users of naked power to greater trouble than the wielders of authority. In this book, we on occasion speak of “formal authority.” By this we mean that the right to exercise power is vested in a governmental office. A president, a senator, and a federal judge have formal authority to take certain actions.

What makes power rightful varies from time to time and from country to country. In the United States, we usually say a person has political authority if his or her right to act in a certain way is conferred by a law or by a state or national constitution. But what makes a law or constitution a source of right? That is the question of **legitimacy**. In the United States, the Constitution today is widely, if not unanimously, accepted as a source of legitimate authority, but that was not always the case.

## Defining Democracy

On one matter, virtually all Americans seem to agree: no exercise of political power by government at any level is legitimate if it is not in some sense democratic.

That wasn’t always the prevailing view. In 1787, as the Framers drafted the Constitution, Alexander Hamilton worried that the new government he helped create might be too democratic, while George Mason, who refused to sign the Constitution, worried that it was not democratic enough. Today, however, almost everyone believes that democratic government is the only proper kind. Most people believe that American government is democratic; some believe that other institutions of public life—schools, universities, corporations, trade unions, churches—also should be run on democratic principles if they are to be legitimate; and some insist that promoting democracy abroad ought to be a primary purpose of U.S. foreign policy.

**Democracy** is a word with at least two different meanings. First, the term *democracy* is used to describe those regimes that come as close as possible to Aristotle’s

**power** The ability of one person to get another person to act in accordance with the first person’s intentions.

**authority** The right to use power.

**legitimacy** Political authority conferred by law or by a state or national constitution.

**democracy** The rule of the many.

**direct or participatory democracy**

A government in which all or most citizens participate directly.

**representative democracy**

A government in which leaders make decisions by winning a competitive struggle for the popular vote.

definition—the “rule of the many.”<sup>10</sup> A government is democratic if all, or most, of its citizens participate directly in either holding office or making policy. This often is called **direct or participatory democracy**. In Aristotle’s time—Greece in the 4th century B.C.—such a government was possible. The Greek city-state, or *polis*, was quite small, and within it citizenship was extended to all free adult male property holders. (Slaves, women, minors, and those without property

were excluded from participation in government.) In more recent times, the New England town meeting approximates the Aristotelian ideal. In such a meeting, the adult citizens of a community gather once or twice a year to vote directly on all major issues and expenditures of the town. As towns have become larger and issues more complicated, many town governments have abandoned the pure town meeting in favor of either the representative town meeting (in which a large number of elected representatives, perhaps 200–300, meet to vote on town affairs) or representative government (in which a small number of elected city councilors make decisions).

The second definition of *democracy* is the principle of governance of most nations that are called democratic. It was most concisely stated by economist Joseph Schumpeter: “The democratic method is that institutional arrangement for arriving at political decisions in which individuals [i.e., leaders] acquire the power to decide by means of a competitive struggle for the people’s vote.”<sup>11</sup> Sometimes this method is called, approvingly, **representative democracy**; at other times it is referred to, disapprovingly, as the elitist theory of democracy. It is justified by two arguments. First, it is impractical, owing to limits of time, information, energy, interest, and expertise, for the public at large to decide on public policy, but it is not impractical to expect them to make reasonable choices among competing leadership groups. Second, some people (including, as we shall see in the next chapter, many of the Framers of the Constitution) believe direct democracy is likely to lead to bad decisions because people often decide large issues on the basis of fleeting passions and in response to popular demagogues. This concern about direct democracy persists today, as evidenced by the statements of leaders who disagree with voter decisions. For example, voters in many states have rejected referenda that would have increased public funding for private schools. Politicians who oppose the defeated referenda speak approvingly of the “will of the people,” but politicians who favor them speak disdainfully of “mass misunderstanding.”

Whenever we refer to that form of democracy involving the direct participation of all or most citizens, we use the term *direct or participatory democracy*. Whenever the word *democracy* is used alone in this book, it will have the meaning Schumpeter gave it. Schumpeter’s definition usefully

implies basic benchmarks that enable us to judge the extent to which any given political system is democratic.<sup>12</sup> A political system is *nondemocratic* to the extent that it denies equal voting rights to part of its society and severely limits (or outright prohibits) “the civil and political freedoms to speak, publish, assemble, and organize,”<sup>13</sup> all of which are necessary to a truly “competitive struggle for the people’s vote.” A partial list of nondemocratic political systems would include absolute monarchies, empires, military dictatorships, authoritarian systems, and totalitarian states.<sup>14</sup>

Scholars of comparative politics and government have much to teach about how different types of political systems—democratic and nondemocratic—arise, persist, and change. For our present purposes, however, it is most important to understand that America itself was once far less democratic than it is today and that it was so not by accident but by design. As we discuss in the next chapter, the men who wrote the Constitution did not use the word *democracy* in that document. They wrote instead of a “republican form of government,” but by that they meant what we call “representative democracy.” And, as we emphasize when discussing civil liberties and civil rights (see Chapters 4 and 5), and again when discussing political participation (see Chapter 8), the United States was not born as a full-fledged representative democracy. And for all the progress of the past half-century or so, the nation’s representative democratic character is still very much a work in progress.

For any representative democracy to work, there must, of course, be an opportunity for genuine leadership competition. This requires in turn that individuals and parties be able to run for office; that communications (through speeches or the press, in meetings, and on the Internet) be free; and that the voters perceive that a meaningful choice exists. But what, exactly, constitutes a “meaningful choice”? How many offices should be elective and how many appointive? How many candidates or parties can exist before the choices become hopelessly confused? Where will the money come from to finance electoral campaigns? There are many answers to such questions. In some European democracies, for example, very few offices—often just those in the national or local



**IMAGE 1-1** Immigration reform advocates organize a rally to build popular support for their cause.

legislature—are elective, and much of the money for campaigning for these offices comes from the government. In the United States, many offices—executive and judicial as well as legislative—are elective, and most of the money the candidates use for campaigning comes from industry, labor unions, and private individuals.

Some people have argued that the virtues of direct or participatory democracy can and should be reclaimed even in a modern, complex society. This can be done either by allowing individual neighborhoods in big cities to govern themselves (community control) or by requiring those affected by some government program to participate in its formulation (citizen participation). In many states, a measure of direct democracy exists when voters can decide on referendum issues—that is, policy choices that appear on the ballot. The proponents of direct democracy defend it as the only way to ensure that the “will of the people” prevails.

As we discuss in the nearby Constitutional Connections feature, and as we explore more in Chapter 2, the Framers of the Constitution did not think that the “will of the people” was synonymous with the “common interest” or the “public good.” They strongly favored representative democracy over direct democracy, and they believed that elected officials could best ascertain what was in the public interest.

## 1-2 Political Power in America: Five Views

Scholars differ in their interpretations of the American political experience. Where some see a steady march of democracy, others see no such thing. Where some emphasize how voting and other rights have been steadily expanded, others stress how they were denied to so many for so long, and so forth. Short of attempting to reconcile these competing historical interpretations, let us step back now for a moment to our definition of representative democracy and five competing views about how political power has been distributed in America.

*Representative democracy* is defined as any system of government in which leaders are authorized to make decisions—and thereby to wield political power—by winning a competitive struggle for the popular vote. It is obvious then that very different sets of hands can control political power, depending on what kinds of people can become leaders, how the struggle for votes is carried on, how much freedom to act is given to those who win the struggle, and what other sorts of influence (besides the desire for popular approval) affect the leaders’ actions.

The actual distribution of political power in a representative democracy will depend on the composition of the political elites who are involved in the struggles for power and over policy. By **elite**, we mean an identifiable group of persons who possess a disproportionate share of some valued resource—in this case, political power.

There are at least five views about how political power is distributed in America: 1. the **class view** (wealthy capitalists and other economic elites determine most policies); 2. the **power elite view** (a group of business, military, labor union, and elected officials controls most decisions); 3. the **bureaucratic view** (appointed bureaucrats ultimately run everything); 4. the **pluralist view** (representatives of a large number of interest groups are in charge); and 5. the **creedal passion view** (morally impassioned elites drive political change).

The first view began with the theories of Karl Marx, who, in the 19th century, argued that governments were dominated by business owners (the “bourgeoisie”) until a revolution replaced them with rule by laborers (the “proletariat”).<sup>15</sup> But strict Marxism has collapsed in most countries. Today, a **class view**, though it may derive inspiration from Marx,

**elite** Persons who possess a disproportionate share of some valued resource, such as money, prestige, or expertise.

**class view** View that the government is dominated by capitalists.



## CONSTITUTIONAL CONNECTIONS

### Deciding What’s Legitimate

Much of American political history has been a struggle over what constitutes legitimate authority. The Constitutional Convention in 1787 was an effort to see whether a new, more powerful federal government could be made legitimate; the succeeding administrations of George Washington, John Adams, and Thomas Jefferson were in large measure preoccupied with disputes over the kinds of decisions that were legitimate for the federal government to make. The Civil War was a bloody struggle over slavery and the legitimacy of the federal union; the New Deal of Franklin Roosevelt was hotly debated by those who disagreed over whether it was

legitimate for the federal government to intervene deeply in the economy. Not uncommonly, the federal judiciary functions as the ultimate arbiter of what is legitimate in the context of deciding what is or is not constitutional (see Chapter 16). For instance, in 2012, amidst a contentious debate over the legitimacy of the federal health care law that was enacted in 2010, the U.S. Supreme Court decided that the federal government could require individuals to purchase health insurance but could not require states to expand health care benefits for citizens participating in the federal–state program known as Medicaid.



**power elite view** View that the government is dominated by a few top leaders, most of whom are outside of government.

**bureaucratic view** View that the government is dominated by appointed officials.

**pluralist view** View that competition among all affected interests shapes public policy.

**creedal passion view** View that morally impassioned elites drive important political changes.

**bureaucratic view** was first set forth by German scholar Max Weber (1864–1920). He argued that in order to become successful, the modern state puts its affairs in the hands of appointed bureaucrats whose competence is essential to the management of complex affairs.<sup>17</sup> These officials, invisible to most people, have mastered the written records and legislative details of the government and do more than just implement democratic policies; they actually make those policies.

The fourth view holds that political resources—such as money, prestige, expertise, and access to the mass media—have become so widely distributed that no single elite, no social class, no bureaucratic arrangement, can control them. Many 20th-century political scientists, among them David B. Truman, adopted a **pluralist view**.<sup>18</sup> In the United States, they argued, political resources are broadly shared in part because there are so many governmental institutions (cities, states, school boards) and so many rival institutions (legislatures, executives, judges, bureaucrats) that no single group can dominate most, or even much, of the political process.

The fifth view maintains that while each of the other four views is correct with respect to how power is distributed on certain issues or during political “business as usual” periods, each also misses how the most important policy decisions and political changes are influenced by morally impassioned elites who are motivated less by economic self-interest than they are by an almost religious zeal to bring government institutions and policies into line with democratic ideals. Samuel P. Huntington articulated this **creedal passion view**, offering the examples of Patrick Henry and the revolutionaries of the 1770s, the advocates of Jackson-style democracy in the

is less dogmatic and emphasizes the power of “the rich” or the leaders of multinational corporations.

The second view ties business leaders together with other elites whose perceived power is of concern to the view’s adherents. These elites may include top military officials, labor union leaders, mass media executives, and the heads of a few special-interest groups. Derived from the work of sociologist C. Wright Mills, this **power elite view** argues that American democracy is dominated by a few top leaders, many of them wealthy or privately powerful, who do not hold elective office.<sup>16</sup>

The third view is that appointed officials run everything despite the efforts of elected officials and the public to control them. The

1820s, the progressive reformers of the early 20th century, and the leaders of the civil rights and antiwar movements in the mid-20th century.<sup>19</sup>

## 1-3 Who Governs? To What Ends?

So, which view is correct? At one level, all are correct, at least in part: Economic class interests, powerful cadres of elites, entrenched bureaucrats, competing pressure groups, and morally impassioned individuals have all at one time or another wielded political power and played a part in shaping our government and its policies.

But, more fundamentally, understanding any political system means being able to give reasonable answers to each of two separate but related questions about it: Who governs, and to what ends?

We want to know the answer to the first question because we believe that those who rule—their personalities and beliefs, their virtues and vices—will affect what they do to and for us. Many people think they already know the answer to the question, and they are prepared to talk and vote on that basis. That is their right, and the opinions they express may be correct.

But they also may be wrong. Indeed, many of these opinions must be wrong because they are in conflict. When asked, “Who governs?” some people will say “the unions” and some will say “big business”; others will say “the politicians,” “the people,” or “the special interests.” Still others will say “Wall Street,” “the military,” “crackpot liberals,” “the media,” “the bureaucrats,” or “white males.” Not all these answers can be correct—at least not all of the time.

The answer to the second question is important because it tells us how government affects our lives. We want to know not only who governs, but what difference it makes who governs. In our day-to-day lives, we may not think government makes much difference at all. In one sense that is right because our most pressing personal concerns—work, play, love, family, health—essentially are private matters on which government touches but slightly. But in a larger and longer perspective, government makes a substantial difference. Consider that in 1935, 96 percent of all American families paid no federal income tax, and for the 4 percent or so who did pay, the average rate was only about 4 percent of their incomes. Today almost all families pay federal payroll taxes, and the average rate is about 20 percent of their incomes. Or consider that in 1960, in many parts of the country, African Americans could ride only in the backs of buses, had to use washrooms and drinking fountains that were labeled “colored,” and could not be served in most public restaurants. While racism remains an important problem, such legal restrictions have largely been eliminated, in large part because of decisions by the federal government.

It is important to bear in mind that we wish to answer two different questions, and not two versions of the same question. You cannot always predict what goals government will establish by knowing only who governs, nor can you

always tell who governs by knowing what activities government undertakes. Most people holding national political office are middle-class, middle-aged, white, Protestant males, but we cannot then conclude that the government will adopt only policies that are to the narrow advantage of the middle class, the middle-aged, whites, Protestants, or men. If we thought that, we would be at a loss to explain why the rich are taxed more heavily than the poor, why the War on Poverty was declared, why constitutional amendments giving rights to African Americans and women passed Congress by large majorities, or why Catholics and Jews have been appointed to so many important governmental posts.

This book is devoted chiefly to answering the question, *who governs*? It is written in the belief that this question cannot be answered without looking at how government makes—or fails to make—decisions about a large variety of concrete issues. Thus, in this book we inspect government policies to see what individuals, groups, and institutions seem to exert the greatest power in the continuous struggle to define the purposes of government.



## HOW WE COMPARE

### Academic Freedom

You are reading a textbook on American government, but how is the freedom to study, teach, or do research protected from undue government interference? And how do European democracies protect academic freedom?

The U.S. Constitution does not mention academic freedom. Rather, in America, the federal and state courts have typically treated academic freedom, at least in tax-supported universities, as “free speech” strongly protected under the First Amendment.

In each of nine European nations, the constitution is silent on academic freedom, but various national laws protect it. In 13 other European nations, academic freedom is protected both by explicit constitutional language and by national legislation. But is academic freedom better protected in these nations than in either the United States or elsewhere in Europe?

Not necessarily. Germany’s constitution states that “research and teaching are free” but subject to “loyalty to the constitution.” Italy’s constitution offers lavish protections for academic freedom, but its national laws severely restrict those same freedoms.

The United Kingdom has no written constitution, but its national laws regarding academic freedom (and university self-governance) are quite restrictive by American standards.

**Source:** Terence Karran, “Freedom in Europe: A Preliminary Analysis,” *Higher Education Policy* 20 (2007): 289–313.

## Expanding the Political Agenda

### *political agenda*

Issues that people believe require governmental action.

No matter who governs, the most important decision that affects policymaking is also the least noticed one: deciding what to make policy *about*, or in the language of political science, deciding what belongs on the **political agenda**. The political agenda consists of issues that people believe require governmental action. We take for granted that politics is about certain familiar issues such as taxes, energy, welfare, civil rights, and homeland security. We forget that there is nothing inevitable about having these issues, rather than some other ones, on the nation’s political agenda.

For example, at one time it was unconstitutional for the federal government to levy income taxes; energy was a non-issue because everyone (or at least everyone who could chop down trees for firewood) had enough; welfare was something for cities and towns to handle; civil rights were supposed to be a matter of private choice rather than government action; “homeland security” was not in the political lexicon, and a huge federal cabinet department by that name was nowhere on the horizon.

Because many people believe that whatever the government now does it ought to continue doing, and because changes in attitudes and the impact of events tend to increase the number of things that government does, the political agenda is always growing larger. Thus, today there are far fewer debates about the legitimacy of a proposed government policy than there were in the 1920s or the 1930s.

Popular views regarding what belongs on the political agenda often are changed by events. During wartime or after a terrorist attack on this country, many people expect the government to do whatever is necessary to win, whether or not such actions are clearly authorized by the



**IMAGE 1-2** Seeing first responders in action in the immediate aftermath of 9/11, Americans felt powerfully connected to their fellow citizens.

Steve Wood/REX/Newscom

Constitution. Economic depressions or deep recessions, such as the ones that began in 1929 and 2007, also lead many people to expect the government to take action. A coal mine disaster leads to an enlarged governmental role in promoting mine safety. A series of airplane hijackings leads to a change in public opinion so great that what once would have been unthinkable—requiring all passengers at airports to be searched before boarding their flights—becomes routine.

But sometimes the government enlarges the political agenda, often dramatically, without any crisis or widespread public demand. This may happen even at a time when the conditions at which a policy is directed are improving. For instance, there was no mass public demand for government action to make automobiles safer before 1966, when a law was passed imposing safety standards on cars. Though the number of auto fatalities (per 100 million miles driven) had gone up slightly just before the law was passed, in the long term, highway deaths had been more or less steadily trending downward.

It is not easy to explain why the government adds new issues to its agenda and adopts new programs when there is little public demand and when, in fact, there has been an improvement in the conditions to which the policies are addressed. In general, the explanation may be found in the behavior of groups, the workings of institutions, the media, and the action of state governments.

## Groups

Many policies are the result of small groups of people enlarging the scope of government by their demands. Sometimes these are organized interests (e.g., corporations or unions); sometimes they are intense but unorganized groups (e.g., urban minorities). The organized groups often work quietly, behind the scenes; the intense, unorganized ones may take their causes to the streets.

For example, organized labor favored a tough federal safety law governing factories and other workplaces, not because it was unaware that factory conditions had been improving, but because the standards by which union leaders and members judged working conditions had risen even faster. As people became better off, conditions that once were thought normal suddenly became intolerable.

## Government Institutions

Among the institutions whose influence on agenda-setting has become especially important are the courts and the bureaucracy. The courts can make decisions that force the hand of the other branches of government. For example, when in 1954 the Supreme Court ordered schools desegregated, Congress and the White House could no longer ignore the issue. Local resistance to implementing the order led President Dwight D. Eisenhower to send troops to Little Rock, Arkansas, despite his dislike for using force against local governments.

Similarly, when the Supreme Court ruled in 1973 that the states could not ban abortions during the first trimester of pregnancy, abortion suddenly became a national political issue. Right-to-life activists campaigned to reverse the

Court's decision or, failing that, to prevent federal funds from being used to pay for abortions. Pro-choice activists fought to prevent the Court from reversing course and to get federal funding for abortions.

In these and many other cases, the courts act like trip wires: When activated, they set off a chain reaction of events that alters the political agenda and creates a new constellation of political forces.

The bureaucracy has acquired a new significance in American politics not simply because of its size or power but also because it is now a source of political innovation. At one time, the federal government *reacted* to events in society and to demands from segments of society; ordinarily it did not itself propose changes and new ideas. Today, the bureaucracy is so large and includes within it so great a variety of experts and advocates, that it has become a *source* of policy proposals as well as an implementer of those that become law.

## Media

National news organizations can either help place new matters on the agenda or publicize those matters placed there by others. There was a close correlation between the political attention given in the Senate to proposals for new safety standards for industry, coal mines, and automobiles and the amount of space devoted to these questions in the pages of *The New York Times*. Newspaper interest in the matter, low before the issue was placed on the agenda, peaked at about the time the bill was passed.<sup>20</sup>

It is hard, of course, to decide which is the cause and which the effect. The press may have stimulated congressional interest in the matter or merely reported on what Congress had already decided to pursue. Nonetheless, the press must choose which of thousands of proposals it will cover. The beliefs of editors and reporters led it to select the safety issue.

## Action by the States

National policy increasingly is being made by the actions of state governments. You may wonder how. After all, a state can only pass laws that affect its own people. Of course, the national government may later adopt ideas pioneered in the states, as it did when Congress passed a “Do Not Call” law to reduce how many phone calls you will get from salespeople while you are trying to eat dinner. The states had taken the lead on this issue.

But there is another way in which state governments can make national policy directly without Congress ever voting on the matter. The attorneys general of states may sue a business firm and settle the suit with an agreement that binds the industry throughout the country.

The effect of one suit was to raise prices for consumers and create a new set of regulations. This is what happened in 1998 with the tobacco agreement negotiated between cigarette companies and some state attorneys general. The companies agreed to raise their prices, pay more than \$240 billion to state governments (to use as they wished) and several billion dollars to private lawyers, and comply with a massive regulatory program. A decade later, the federal government



passed laws that reinforced the states' regulations, culminating in the Family Smoking Prevention Tobacco Control Act of 2009.

## 1-4 The Politics of Different Issues

Once an issue is on the political agenda, its nature affects the kind of politicking that ensues. Some issues provoke intense interest group conflict; others allow one group to prevail almost unchallenged. Some issues involve ideological appeals to broad national constituencies; others involve quiet bargaining in congressional offices. We all know that private groups try to influence government policies; we often forget that the nature of the issues with which government is dealing influences the kinds of groups that become politically active.

One way to understand why government handles a given issue as it does is to examine what appear to be the costs and benefits of the proposed policy. The **cost** is any burden, monetary or nonmonetary, that some people must bear or believe they must bear, if the policy is adopted. The costs of a government spending program are the taxes it entails; the cost of a foreign policy initiative may be the increased chance of having the nation drawn into war.

The **benefit** is any satisfaction, monetary or nonmonetary, that people believe they will enjoy if the policy is adopted. The benefits of a government spending program are the payments, subsidies, or contracts received by some people; the benefits of a foreign policy initiative may include the enhanced security of the nation, the protection of a valued ally, or the vindication of some important principle such as human rights.

Two aspects of these costs and benefits should be borne in mind. First, it is the *perception* of costs and benefits that affects politics. People may think the cost of an auto emissions control system is paid by the manufacturer, when it is actually passed on to the consumer in the form of higher prices and reduced performance. Political conflict over pollution control will take one form when people think that the polluting industries pay the costs and another form when they think that the consumers pay.

Second, people take into account not only who benefits but also whether it is legitimate for that group to benefit. When programs providing financial assistance to women with dependent children were first developed in the early part of the 20th century, they were relatively noncontroversial because people saw the money as going to widows and orphans who deserved such aid. Later on, giving aid to mothers with dependent children became controversial because some people now perceived the recipients not as deserving widows but as irresponsible women who had never married. Whatever the truth of the matter, the program had lost some of its legitimacy because the beneficiaries were no longer seen as "deserving." By the same token, groups once thought undeserving, such as men out of work, were later thought to be entitled to aid, and thus the unemployment compensation program acquired a legitimacy that it once lacked.

Politics is in large measure a process of raising and settling disputes over who *will* benefit or pay for a program and who *ought* to benefit or pay. Because beliefs about the results of a program and the rightness of those results are matters of opinion, it is evident that ideas are at least as important as interests in shaping politics. In recent years, ideas have become especially important with the rise of issues whose consequences are largely intangible, such as abortion, school prayer, and gay rights.

Though perceptions about costs and benefits change, most people most of the time prefer government programs that provide substantial benefits to them at low cost. This rather obvious fact can have important implications for how politics is carried out. In a political system based on some measure of popular rule, public officials have a strong incentive to offer programs that confer—or appear to confer—benefits on people with costs either small in amount, remote in time, or borne by "somebody else." Policies that seem to impose high, immediate costs in return for small or remote benefits will be avoided, enacted with a minimum of publicity, or proposed only in response to a real or apparent crisis.

Ordinarily, no president would propose a policy that would immediately raise the cost of fuel, even if he were convinced that future supplies of oil and gasoline were likely to be exhausted unless higher prices reduced current consumption. But when a crisis occurs, such as the Arab oil cartel's price increases beginning in 1973, it becomes possible for the president to offer such proposals—as did Nixon, Ford, and Carter in varying ways. Even then, however, people are reluctant to bear increased costs, and thus many are led to dispute the president's claim that an emergency actually exists.

## Four Types of Politics

These entirely human responses to the perceived costs and benefits of proposed policies can be organized into a simple theory of politics.<sup>21</sup> It is based on the observation that the costs and benefits of a policy may be *widely distributed* (spread over many, most, or even all citizens) or *narrowly concentrated* (limited to a relatively small number of citizens or to some identifiable, organized group).

For instance, a widely distributed cost would include an income tax, a Social Security tax, or a high rate of crime. A widely distributed benefit might include retirement benefits for all citizens, clean air, national security, or low crime rates. Examples of narrowly concentrated costs include the expenditures by a factory to reduce its pollution, government regulations imposed on doctors and hospitals participating in the Medicare program, or restrictions on freedom of speech imposed on a dissident political group. Examples of narrowly concentrated benefits include subsidies to farmers or merchant ship companies, the enlarged freedom to

**cost** A burden that people believe they must bear if a policy is adopted.

**benefit** A satisfaction that people believe they will enjoy if a policy is adopted.

**majoritarian**

**politics** A policy in which almost everybody benefits and almost everybody pays.

**interest group**

**politics** A policy in which one small group benefits and another small group pays.

or entrepreneur may win or lose depending on its influence and the temper of the times.

### Majoritarian Politics: Distributed Benefits, Distributed Costs

Some policies promise benefits to large numbers of people at a cost that large numbers of people will have to bear (see Figure 1-1). For example, almost everyone will sooner or later receive Social Security benefits, and almost everyone who works has to pay Social Security taxes.

Such **majoritarian politics** are usually not dominated by pulling and hauling among rival interest groups; instead, they involve making appeals to large segments of voters and their representatives in hopes of finding a majority. The reason why interest groups are not so important in majoritarian politics is that citizens rarely will have much incentive to join an interest group if the policy that such a group supports will benefit everybody, whether or not they are members of the group. This is the “free-rider” problem. Why join the Committee to Increase (or Decrease) the Defense Budget when what you personally contribute to that committee makes little difference in the outcome, and when you will enjoy the benefits of more (or less) national defense even if you have stayed on the sidelines?

Majoritarian politics may be controversial, but the controversy is usually over matters of cost or ideology, not between rival interest groups. For example, there was intense

speak and protest afforded a dissident group, or protection against competition given to an industry because of favorable government regulation.

The perceived distribution of costs and benefits shapes the *kinds of political coalitions that will form*—but it will not necessarily determine *who wins*. There are four types of politics, and a given popular majority, interest group, client,

controversy over the health care plan that President Barack Obama signed into law, but interest groups did not dominate the debate, and many different types of politics were at play. The military budget went up during the early 1980s, down in the late 1980s, up after 2001, and down again after 2010. These changes reflected different views on how much we need to spend on our military operations abroad.

### Interest Group Politics: Concentrated Benefits, Concentrated Costs

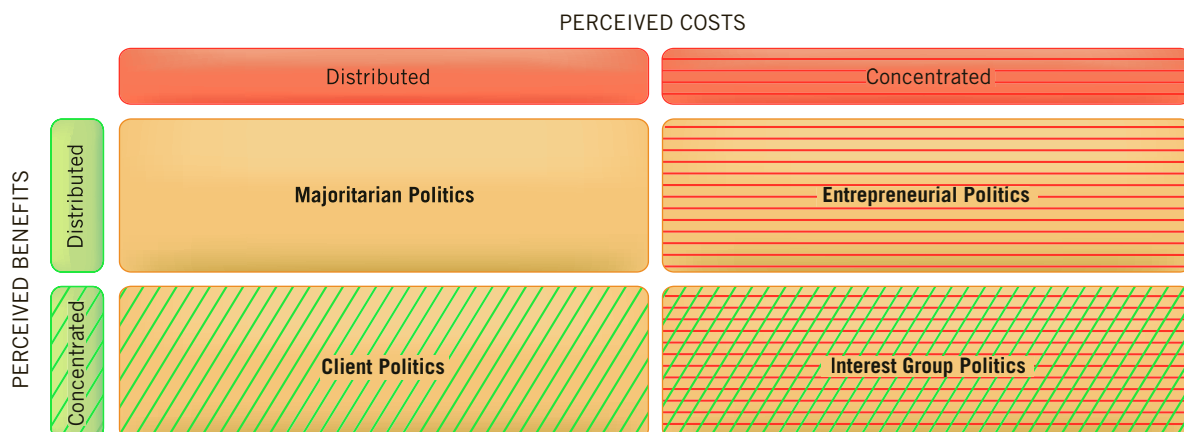
In **interest group politics**, a proposed policy will confer benefits on some relatively small, identifiable group and impose costs on another small, equally identifiable group. For example, when Congress passed a bill requiring companies to give 60 days’ notice of a plant closing or a large-scale layoff, labor unions (whose members would benefit) backed the bill, and many business firms (which would pay the costs) opposed it.

Issues of this kind tend to be fought out by organized interest groups. Each side will be affected so powerfully by the outcome that it has a strong incentive to mobilize. Union members who worry about layoffs will have a personal stake in favoring the notice bill; business leaders who fear government control of investment decisions will have an economic stake in opposing it.

Interest group politics often produces decisions about which the public is uninformed. For instance, there have been bitter debates between television broadcasters and cable companies over who may send what kind of signals to which homes. But these debates hardly draw any public notice—until after a law is passed and people see their increased cable charges.

Though many issues of this type involve monetary costs and benefits, they can also involve intangible considerations. If the American Nazi party wants to march through a predominantly Jewish neighborhood carrying flags that bear swastikas, the community may organize itself to resist in revulsion, due to the horrific treatment of Jews by Nazi Germany. Each side may hire lawyers to debate the issue before the city council and in the courts.

**FIGURE 1-1** A Way of Classifying and Explaining the Politics of Different Policy Issues



## Client Politics: Concentrated Benefits, Distributed Costs

With **client politics** some identifiable, often small group will benefit, but everybody—or at least a large part of society—will pay the costs. Because the benefits are concentrated, the group to receive those benefits has an incentive to organize and work to get them. But because the costs are widely distributed, affecting many people only slightly, those who pay the costs may be either unaware of or indifferent to any costs, because per capita they are so small.

This situation gives rise to client politics (sometimes called clientele politics); the beneficiary of the policy is the “client” of the government. For example, many farmers benefit substantially from agricultural price supports, but the far more numerous food consumers have no idea what these price supports cost them in taxes and higher food prices. Similarly, for some time airlines benefited from the higher prices they were able to charge on certain routes as a result of government regulations that restricted competition over prices. But the average passenger was unaware that his or her costs were higher, or did not think the higher prices were worth making a fuss about.

Not all clients have economic interests. Localities can also benefit as clients when a city or county obtains a new dam, a better harbor, or an improved irrigation system, for example. Some of these projects may be worthwhile, others may not; by custom, however, they are referred to as *pork-barrel projects*. Usually several pieces of “pork” are put into one barrel—that is, several projects are approved in a single piece of **pork-barrel legislation**, such as the “rivers

and harbors” bill that Congress passes almost every year. Trading votes in this way attracts the support of members of Congress from each affected area; with enough projects a majority coalition is formed. This process is called **log-rolling**.

Not every group that wants something from government at little cost to the average citizen will get it. Welfare recipients cost the typical taxpayer a small amount each year, yet there was great resistance to increasing these benefits. The homeless have not organized themselves to get benefits; indeed, most do not even vote. Yet benefits are being provided (albeit in modest amounts). These examples illustrate the importance of popular views concerning the legitimacy of client claims as a factor in determining the success of client demands.

By the same token, groups can lose legitimacy that they once had. People who grow tobacco once were supported simply because they were farmers, and were thus seen as both “deserving” and politically important. But when people began worrying about the health risks associated with using tobacco, farmers who produce tobacco lost some legitimacy compared to those who produce corn or cotton. As a result, it became harder to get votes for maintaining tobacco price supports and easier to slap higher taxes on cigarettes.

### **client politics**

A policy in which one small group benefits and almost everybody pays.

### **pork-barrel legislation**

Legislation that gives tangible benefits to constituents in several districts or states in the hope of winning their votes in return.

### **log-rolling**

A legislator supports a proposal favored by another in return for support of his or hers.

### **entrepreneurial politics**

A policy in which almost everybody benefits and a small group pays.



**IMAGE 1-3** During the Great Depression, depositors besiege a bank hoping to get their savings out.

## Entrepreneurial Politics: Distributed Benefits, Concentrated Costs

In **entrepreneurial politics**, society as a whole or some large part of it benefits from a policy that imposes substantial costs on some small, identifiable segment of society. The antipollution and safety requirements for automobiles were proposed as ways of improving the health and well-being of all people at the expense (at least initially) of automobile manufacturers.

It is remarkable that policies of this sort are ever adopted, and in fact many are not. After all, the American political system creates many opportunities for checking and blocking the actions of others. The Founders deliberately arranged things so that it would be difficult to pass a new law; a determined minority therefore has an excellent chance of blocking a new policy. And any organized group that fears the loss of some privilege or the imposition of some burden will become a very determined minority indeed. The opponent has every incentive to work hard; the large group of prospective beneficiaries may be unconvinced of the benefit or regard it as too small to be worth fighting for.



**policy entrepreneurs**

Activists in or out of government who pull together a political majority on behalf of unorganized interests.

Nonetheless, policies with distributed benefits and concentrated costs are in fact adopted, and in recent decades they have been adopted with increasing frequency. A key element in the adoption of such policies has been the work of people who act on behalf of the unorganized or indifferent majority. Such people, called **policy entrepreneurs**, are those both in and out of government who find ways of pulling together a legislative majority on behalf of interests that are not well represented in the government. These policy entrepreneurs may or may not represent the interests and wishes of the public at large, but they do have the ability to dramatize an issue in a convincing manner. Ralph Nader is perhaps the best-known example of a policy entrepreneur, or as he might describe himself, a “consumer advocate.” But there are other examples from both ends of the political spectrum, conservative as well as liberal.

Entrepreneurial politics can occur without the leadership of a policy entrepreneur, if voters or legislators in large numbers become disgruntled suddenly by the high cost of some benefit that a group is receiving—or become convinced of the urgent need for a new policy to impose such costs. For example, voters may not care about government programs that benefit the oil industry when gasoline costs only one dollar a gallon, but they might care very much when the price rises to three dollars a gallon, even if the government benefits had nothing to do with the price increase. By the same token, legislators may not worry much about the effects of smog in the air until a lot of people develop burning eyes and runny noses during an especially severe smog attack.

In fact, most legislators did not worry very much about toxic or hazardous wastes until 1977, when the Love Canal dump site near Buffalo, New York spilled some of its toxic waste into the backyards of an adjacent residential neighborhood and people were forced to leave their homes. Five years later, anyone who had forgotten about the Love Canal was reminded of it when the town of Times Beach, Missouri, had to be permanently evacuated because it had been contaminated with the chemical dioxin. Only then did it become widely known that there were more than 30,000 toxic waste sites nationwide that posed public safety risks. The Superfund program was born in 1980 of the political pressure that developed in the wake of these and other highly publicized tales of toxic waste dangers. Superfund was intended to force industries to clean up their own toxic waste sites. It also authorized the Environmental Protection Agency (EPA) to act speedily, with or without cooperation from industries, in identifying and cleaning up any sites that posed a large or imminent danger.

Superfund suffered a number of political and administrative problems, and only a few of the 1,300 sites initially targeted by the EPA had been cleaned up a dozen years after the program went into effect.<sup>22</sup> Regardless, Superfund is a good illustration of entrepreneurial politics in action. Special taxes on once largely unregulated oil and chemical

companies funded the program. These companies had enjoyed special tax breaks, but as the politics of the issue changed, they were forced to shoulder special tax burdens. In effect, the politics of the issue changed from client politics to entrepreneurial politics.

Thereby, Superfund also illustrates how dynamic the politics of policymaking can be. Once an issue makes its way on to the political agenda, the politics of the issue can remain stable, change a little or a lot, and change very slowly or quite suddenly. And policy issues can “migrate” from one type of politics (and one of the four boxes) to another.

By the same token, the policy dynamics of some issues are simply harder to categorize and explain than the policy dynamics of others. For instance, in the mid-2000s, 13 states amended their state constitutions to prohibit or further restrict gay marriage. In 2008, California voters approved a ballot measure, Proposition 8, banning gay marriage. But virtually all of these policies were enacted at a time when popular support for gay rights, including same-sex marriage, was rising. In 2001, by a margin of 57 percent to 35 percent, Americans opposed gay marriage; but, by 2013, a 49 percent to 44 percent plurality favored gay marriage. In 2012, President Barack Obama, previously having ordered an end to the ban on gays in the U.S. military, publicly declared his support for legalizing same-sex marriage. Surveys indicated that the only groups still harboring wide majorities opposed to same-sex marriage were evangelical Christians and adults born in 1945 or earlier.<sup>23</sup> In 2013, the U.S. Supreme Court struck down a 1996 law that allowed the federal government to discriminate against same-sex married couples, and two years later, the Court declared that same-sex marriages are constitutional.

So, how best can we categorize or explain the politics of this issue? Which type of politics—majoritarian, client, interest group, or entrepreneurial—were most important to policymaking? Why did state laws become more restrictive at the very time that both mass public opinion and elite opinion were trending toward greater acceptance? Do the still-unfolding policy dynamics of this issue fit neatly (or fit at all) in any of our four boxes? Start thinking about these questions; we revisit them in Chapters 3 and 6.

Finally, while the politics of some issues do fit neatly into one box or another, the politics of other issues reflect several different types of politics. For example, most major pieces of social legislation reflect *majoritarian* politics (Social Security remains a prime example), but health care issues often have played out within all four boxes—majoritarian, client, interest group, and entrepreneurial—at once. This was certainly true of the politics of the Patient Protection and Affordable Care Act of 2010, better known as “Obamacare.” The perceived costs and benefits of the Obama plan affected the political coalitions that formed around it and involved all four types of politics.

## Understanding Politics

Whether pondering one’s own positions on given issues, attempting to generalize about the politics of different policy issues, or tackling questions about American government, institutions, and policies, an astute student will soon come to

know what Aristotle meant when he wrote that it is “the mark of the educated person to look for precision in each class of things just so far as the nature of the subject admits.”<sup>24</sup>

Ideally, political scientists ought to be able to give clear answers, amply supported by evidence, to the questions we have posed about American democracy, starting with “who governs?” In reality, they can at best give partial, contingent, and controversial answers. The reason is to be found in the nature of our subject. Unlike economists, who assume that people have more or less stable preferences and can compare ways of satisfying those preferences by looking at the relative prices of various goods and services, political scientists are interested in how preferences are formed, especially for those kinds of services, such as national defense or pollution control, that cannot be evaluated chiefly in terms of monetary costs.

Understanding preferences is vital to understanding power. Who did what in government is not hard to find out, but who wielded power—that is, who made a difference in the outcome and for what reason—is much harder to discover. *Power* is a word that conjures up images of deals, bribes, power plays, and arm-twisting. In fact, most power exists because of shared understanding, common friendships, communal or organizational loyalties, and different degrees of prestige. These are hard to identify and almost impossible to quantify.

Nor can the distribution of political power be inferred simply by knowing what laws are on the books or what administrative actions have been taken. The enactment of a consumer protection law does not mean that consumers are powerful, any more than the absence of such a law means that corporations are powerful. The passage of such a law could reflect an aroused public opinion, the lobbying of a small group claiming to speak for consumers, the ambitions of a senator, or the intrigues of one business firm seeking to gain a competitive advantage over another. A close analysis of what the law entails and how it was passed and administered is necessary before much of anything can be concluded.

This book avoids sweeping claims that we have an “imperial” presidency (or an impotent one), an “obstructionist”

Congress (or an innovative one), or “captured” regulatory agencies. Such labels do an injustice to the different roles that presidents, members of Congress, and administrators play in different kinds of issues and in different historical periods.

The view taken in this book is that judgments about institutions and interests can be made only after one has seen how they behave on a variety of important issues or potential issues, such as economic policy, the regulation of business, social welfare, civil rights and liberties, and foreign and military affairs. The policies adopted or blocked, the groups heeded or ignored, the values embraced or rejected—these constitute the raw material out of which one can fashion an answer to the central questions we have asked: Who governs—and to what ends?

The way in which our institutions of government handle social welfare, for example, differs from the way other democratic nations handle it, and it differs as well from the way our own institutions once treated it. The description of our institutions in Part III will therefore include not only an account of how they work today but also a brief historical background on their workings and a comparison with similar institutions in other countries. There is a tendency to assume that how we do things today is the only way they could possibly be done. In fact, there are other ways to operate a government based on some measure of popular rule. History, tradition, and belief weigh heavily on all that we do.

Although political change is not always accompanied by changes in public laws, the policy process is arguably one of the best barometers of changes in who governs. Our way of classifying and explaining the politics of different policy issues has been developed, refined, and tested over more than four decades (longer than most of our readers have been alive!). Our own students and others have valued it mainly because they have found it helps to answer such questions about who governs: How do political issues get on the public agenda in the first place? How, for example, did sexual harassment, which was hardly ever discussed or debated by Congress, burst onto the public agenda? Once on the agenda, how does the politics of issues like income security for older Americans—such as the politics of Social Security, a program that has been on the federal books since 1935 (see Chapter 13)—change over time? And if, today, one cares about expanding civil liberties (see Chapter 4) or protecting civil rights (see Chapter 5), what political obstacles and opportunities will one likely face, and what role will public opinion, organized interest groups, the media, the courts, political parties, and other institutions likely play in frustrating or fostering one’s particular policy preferences, whatever they might be?

Peek ahead, if you wish, but understand that the place to begin a search for how power is distributed in national politics and what purposes that power serves is with the founding of the federal government in 1787: the Constitutional Convention and the events leading up to it. Though the decisions of that time were not made by philosophers or professors, the practical men who made them had a philosophic and professorial cast of mind, and thus they left behind a fairly explicit account of what values they sought to protect and what arrangements they thought ought to be made for the allocation of political power.



B Christopher/Alamy

**IMAGE 1-4** Federal employees protest the 2013 government shutdown.

## LEARNING OBJECTIVES .....

### 1-1 Explain how politics drives democracy.

Politics is the activity by which an issue is agitated or settled. Politics occurs because people disagree and the disagreement must be managed. Disagreements over many political issues, including disputes over government budgets and finances, are often at their essence disagreements over what government should or should not do at all. Democracy can mean either that everyone votes on all government issues (direct or participatory democracy) or that the people elect representatives to make most of these decisions (representative democracy).

### 1-2 Discuss five views of how political power is distributed in the United States.

Some believe that political power in America is monopolized by wealthy business leaders, by other powerful elites, or by entrenched government bureaucrats. Others believe that political resources such as money, prestige, expertise, organizational position, and access to the mass media are so widely dispersed in American society, and the governmental institutions and offices in which power may be exercised so numerous and varied, that no single group truly has all or most political power. In this view, political power in America is distributed more or less widely. Still others suggest that morally impassioned leaders have at times been deeply influential in our politics. No one, however, argues that political resources are distributed equally in America.

### 1-3 Explain why “who governs?” and “to what ends?” are fundamental questions in American politics.

The political agenda consists of those issues that people with decision-making authority believe require government action. The behavior of groups, the

workings of institutions, the media, and the actions of state governments have all figured in the expansion of America’s political agenda, and understanding how those actors have expanded the agenda—that is, “who governs?”—is necessary to understand the nature of American politics. Similarly, the great shifts in the character of American government (its size, scope, institutional arrangements, and the direction of its policies) have reflected complex and sometimes sudden changes in elite or mass beliefs about what government is supposed to do—that is, “to what ends?” The federal government now has policies on street crime, the environment, homeland security, and many other issues that were not on the federal agenda a half-century (or, in the case of homeland security, just 15 years) ago.

### 1-4 Summarize the key concepts for classifying the politics of different policy issues.

One way to classify and explain the politics of different issues is in relation to the perceived costs and benefits of given policies and how narrowly concentrated (limited to a relatively small number of identifiable citizens) or widely distributed (spread over many, most, or all citizens) their perceived costs and benefits are. This approach gives us four types of politics: *majoritarian* (widely distributed costs and benefits), *interest group* (narrowly concentrated costs and benefits), *client* (widely distributed costs and narrowly concentrated benefits), and *entrepreneurial* (narrowly concentrated costs and widely distributed benefits). Different types of coalitions are associated with each type of politics. Issues can sometimes “migrate” from one type of politics to another. Some policy dynamics involve more than one type of politics. And the politics of some issues is harder to classify and explain than the politics of others.

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## CHAPTER 2

# The Constitution

### LEARNING OBJECTIVES

- 2-1** Explain how evolving debates about liberty led from the Revolutionary War to the Constitutional Convention.
- 2-2** Discuss the major proposals and compromise over representation in the Constitutional Convention.
- 2-3** Summarize the key issues presented by Federalists and Antifederalists in ratification debates for the Constitution.
- 2-4** Discuss continuing debates about democracy and the Constitution.

## THEN

When the Constitutional Convention was held in Philadelphia in 1787, its members were all white men. They were not chosen by popular election, and a few famous men, such as Patrick Henry of Virginia, refused to attend. One state, Rhode Island, sent no delegates at all. They assembled in secret and there was no press coverage. The delegates met to remedy the defects of the Articles of Confederation, under which the rebellious colonies had been governed; but instead of fixing the Articles, they wrote an entirely new constitution. Then they publicized it and said that it would go into effect once it had been ratified—not by state legislatures, but by popular conventions in at least nine states.

## NOW

Suppose you think we should have a new constitutional convention to remedy what you and others think are defects in the present document. As you will see later in this chapter, opinions about how our Constitution might be improved are quite diverse. Some critics want the Constitution to create an American version of the parliamentary system of government one finds in the United Kingdom. Others would rather that it weaken the federal government—for example, by requiring that the budget be balanced or setting a limit on tax revenue each year.

Now try to imagine your answers to these questions: How would delegates be picked? How many would there be? Is there any way to limit what the new convention does? Should the meeting be covered by live television, and should the delegates be free to send emails and Twitter messages to outsiders?

## 2-1 The Problem of Liberty

The goal of the American Revolution was liberty. It was not the first revolution with that object (nor was it the last), but it was perhaps the clearest case of a people altering the political order violently, simply in order to protect their liberties. Subsequent revolutions had more complicated or utterly different objectives. The French Revolution in 1789 sought not only liberty, but “equality and fraternity.” The Russian Revolution (1917) and the Chinese Revolution (culminating in 1949) chiefly sought equality and were scarcely concerned with liberty as we understand it.

What the American colonists sought to protect when they signed the Declaration of Independence in 1776 were the traditional liberties to which they thought they were entitled as British subjects. These liberties included the right to bring their legal cases before judges who were truly independent, rather than subordinate to the king; to be free of the burden of having British troops quartered in their homes; to engage in trade without burdensome restrictions; and, of course, to pay no taxes levied by a British Parliament in which they had no direct representation. During the 10 years or more of agitation and argument leading up to the War of Independence, most colonists believed their liberties could be protected while they remained a part of the British Empire.

Slowly but surely opinion shifted. By the time war broke out in 1775, a large number of colonists (though perhaps not a majority) had reached the conclusion that the colonies would have to become independent of Great Britain if their liberties were to be assured. The colonists had many reasons for regarding independence as the only solution, but one is especially important: they no longer had confidence in the English constitution. This constitution was not a single document, but rather a collection of laws, charters, and traditional understandings that proclaimed the liberties of British subjects. In the eyes of the colonists, these liberties were violated regularly, despite their constitutional protection. Clearly, then, the English constitution was an inadequate check on the abuses of political power. The revolutionary leaders sought an explanation of the constitution’s insufficiency, and found it in human nature.

### The Colonial Mind

“A lust for domination is more or less natural to all pears,” one colonist wrote.<sup>1</sup> Men will seek power, many colonists believed, because they are ambitious, greedy, and easily corrupted. John Adams denounced the “luxury, effeminacy, and venality” of English politics; Patrick Henry spoke scathingly of the “corrupt House of Commons”; and Alexander Hamilton described England as “an old, wrinkled, withered, worn-out hag.”<sup>2</sup> This was in part flamboyant rhetoric designed to whip up enthusiasm for the conflict, but it was also deeply revealing of the colonial mindset. Their belief that English politicians—and by implication, most politicians—tended to be corrupt was the colonists’ explanation of why the English constitution was not an adequate guarantee of citizens’ liberty. This opinion was to persist and, as we shall see, profoundly affect the way the Americans went about designing their own governments.

The liberties the colonists fought to protect were, they thought, widely understood. They were based not on the generosity of the king or the language of statutes but on a “higher law” embodying “natural rights” that were ordained by God, discoverable in nature and history, and essential to human progress. These rights, John Dickinson wrote, are “born with us; exist with us; and cannot be taken away from us by any human power.”<sup>3</sup> There was general agreement that the essential rights included life, liberty, and property long before Thomas Jefferson wrote them in the Declaration of Independence. (Jefferson changed “property” to “the pursuit of happiness,” but almost everybody else went on talking about property.)

This emphasis on property did not mean the American Revolution was thought up by the rich and wellborn to protect their interests or that there was a struggle between property owners and the propertyless. In late 18th-century America, most people (except the black slaves) had property of some kind. The overwhelming majority of citizens were self-employed—as farmers or artisans—and rather few people benefited financially by gaining independence from England. Taxes were higher during and after the war than they were before it, trade was disrupted by the conflict, and debts mounted perilously as various expedients were



**unalienable** A human right based on nature or God.

invented to pay for the struggle. There were, of course, war profiteers and those who tried to manipulate the currency to their own advantage, but most

Americans at the time of the war saw the conflict in terms of political rather than economic issues. It was a war of ideology.

We all recognize the glowing language with which Jefferson set out the case for independence in the second paragraph of the Declaration:

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—that whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, having its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*

What almost no one recalls, but are an essential part of the Declaration, are the next 27 paragraphs—in which Jefferson listed, item by item, the specific complaints the colonists had against George III and his ministers. None of these items spoke of social or economic conditions in the colonies; all spoke instead of specific violations of political liberties. The Declaration was in essence a lawyer's brief, prefaced by a stirring philosophical claim that the rights being

violated were **unalienable**—that is, based on nature and Providence, and not on the whims or preferences of people. Jefferson, in his original draft, added another complaint—that the king had allowed the slave trade to continue *and* was inciting slaves to revolt against their masters. Congress, faced with so contradictory a charge, instead decided to include a muted reference to slave insurrections and omit all reference to the slave trade.

## The Real Revolution

The Revolution was more than the War of Independence. It began before the war, continued after it, and involved more than driving out the British army by force of arms. The *real* Revolution, as John Adams afterward explained in a letter to a friend, was the “radical change in the principles, opinions, sentiments, and affections of the people.”<sup>4</sup> This radical change had to do with a new vision of what could make political authority legitimate and personal liberties secure. Government by royal prerogative was rejected; instead, legitimate government would require the consent of the governed. Political power could not be exercised on the basis of tradition, but only as a result of a direct grant of power contained in a written constitution. Human liberty existed before government was organized, and government must respect that liberty. The legislative branch of government, in which the people were directly represented, should be superior to the executive branch.

These were indeed revolutionary ideas. No government at the time had been organized on the basis of these principles. To the colonists, such notions were not empty words, but rules to be put into immediate practice. In 1776, eight states adopted written constitutions. Within a few years, every former colony had adopted one except Connecticut



De Agostini/Getty Images

**IMAGE 2-1** *Signing the Declaration of Independence, painted by John Trumbull.*

and Rhode Island, two states that continued to rely on their colonial charters. Most state constitutions had detailed bills of rights defining personal liberties, and most placed the highest political power in the hands of elected representatives.

Written constitutions, representatives, and bills of rights are so familiar to us now that we don't realize how bold and unprecedented those innovations were in 1776. Indeed, many Americans did not think they would succeed; such arrangements would be either so strong that they would threaten liberty or so weak that they would permit chaos.

The 11 years that elapsed between the Declaration of Independence and the signing of the Constitution in 1787 were years of turmoil, uncertainty, and fear. George Washington headed a bitter, protracted war effort without anything resembling a strong national government to support him. The supply and financing of his army were based on a series of hasty improvisations, most administered badly and few supported adequately by the fiercely independent states. When peace came, many parts of the nation were a shambles. At least a quarter of New York City was in ruins, and many other communities were nearly devastated. Though the British lost the war, they still were powerful on the North American continent, with an army available in Canada (where many Americans loyal to Britain had fled) and a large navy at sea. Spain claimed the Mississippi River Valley and occupied what are now Florida and California. Men who had left their farms to fight came back to discover themselves in debt with no money and heavy taxes. The paper money printed to finance the war was now virtually worthless.

## Weaknesses of the Confederation

The 13 states had formed only a faint semblance of a national government with which to bring order to the nation. The **Articles of Confederation**, which went into effect in 1781, created little more than a "league of friendship" that could not levy taxes or regulate commerce. Each state retained its sovereignty and independence, each state (regardless of size) had one vote in Congress, nine (of 13) votes were required to pass any measure, and the delegates who cast these votes were picked and paid for by the state legislatures. Congress did have the power to make peace, and thus it was able to ratify the treaty with England in 1783. It could coin money, but there was precious little to coin; it could appoint the key army officers, but the army was small and dependent for support on independent state militias; it was allowed to run the post office—then, as now, a thankless task that no one else wanted. In 1785, John Hancock was elected to the meaningless office of "president" under the Articles and never showed up to take the job. Several states claimed the unsettled lands in the West, and they occasionally pressed those claims with guns. Pennsylvania and Virginia went to war near Pittsburgh, and Vermont threatened to become part of Canada. There was no national judicial system to settle these or other claims among the states. To amend the Articles of Confederation, all 13 states had to agree.

Many of the leaders of the Revolution, such as George Washington and Alexander Hamilton, believed a stronger national government was essential. They lamented the

disruption of commerce and travel caused by the quarrelsome states and deeply feared the possibility of foreign military intervention, with England or France playing one state off against another. A small group of men, conferring at Washington's home at Mount Vernon in 1785, decided to call a meeting to discuss trade regulation. That meeting, held at Annapolis, Maryland, in September 1786, was not well attended (no delegates arrived from New England), and so another meeting, this one in Philadelphia, was called for the following spring—in May 1787—to consider ways of remedying the defects of the Confederation.

### Articles of Confederation

A weak constitution that governed America during the Revolutionary War.

### Constitutional Convention

A meeting in Philadelphia in 1787 that produced a new constitution.

## 2-2 The Constitutional Convention

The delegates assembled at Philadelphia at the **Constitutional Convention**, for what was advertised (and authorized by Congress) as a meeting to revise the Articles; they adjourned four months later having written a wholly new constitution. When they met, they were keenly aware of the problems of the confederacy, but far from agreement as to what should be done about those problems. The protection of life, liberty, and property was their objective in 1787 as it had been in 1776, but they had no accepted political theory that would tell them what kind of national government, if any, would serve that goal.

## The Lessons of Experience

They had read ancient and modern political history, only to learn that nothing seemed to work. James Madison spent a good part of 1786 studying books sent to him by Thomas Jefferson, then in Paris, in hopes of finding some model for a workable American republic. He took careful notes on various confederacies in ancient Greece and on the more modern confederacy of the United Netherlands. He reviewed the history of Switzerland and Poland and the ups and downs of the Roman republic. He concluded that there was no model; as he later put it in one of the *Federalist* papers, history consists only of beacon lights "which give warning of the course to be shunned, without pointing out that which ought to be pursued."<sup>5</sup> The problem seemed to be that confederacies were too weak to govern and tended to collapse from internal dissension, while all stronger forms of government were so powerful as to trample the liberties of the citizens.

## State Constitutions

Madison and the others did not need to consult history, or even the defects of the Articles of Confederation, for illustrations of the problem. These could be found in the government of the American states at the time. Pennsylvania and Massachusetts exemplified two aspects of the problem.



**Shays's Rebellion**

A 1787 rebellion in which ex-Revolutionary War soldiers attempted to prevent foreclosures of farms as a result of high interest rates and taxes.

The Pennsylvania constitution, adopted in 1776, created the most radically democratic of the new state regimes. All power was given to a one-house (unicameral) legislature, the Assembly, the members of which were elected annually for one-year terms. No legislator could serve more than four years. There was no governor

or president, only an Executive Council that had few powers. Thomas Paine, whose pamphlets had helped precipitate the break with England, thought the Pennsylvania constitution was the best in America, and in France philosophers hailed it as the very embodiment of the principle of rule by the people. Though popular in France, it was a good deal less popular in Philadelphia. The Assembly disfranchised the Quakers, persecuted conscientious objectors to the war, ignored the requirement of trial by juries, and manipulated the judiciary.<sup>6</sup> To Madison and his friends, the Pennsylvania constitution demonstrated how a government, though democratic, could be tyrannical as a result of concentrating all powers into one set of hands.

The Massachusetts constitution, adopted in 1780, was a good deal less democratic. There was a clear separation of powers among the various branches of government, the directly elected governor could veto acts of the legislature, and judges served for life. Both voters and elected officials had to be property owners; the governor, in fact, had to own at least £1,000 worth of property. The principal officeholders had to swear they were Christians.

**Shays's Rebellion**

But if the government of Pennsylvania was thought too strong, that of Massachusetts seemed too weak despite its "conservative" features. In January 1787, a group of ex-Revolutionary War soldiers and officers, plagued by debts and high taxes and fearful of losing their property to creditors and tax collectors, forcibly prevented the courts in western Massachusetts from sitting. This became known as **Shays's Rebellion**, after one of the officers, Daniel Shays. The governor of Massachusetts asked the Continental Congress to send troops to suppress the rebellion, but it could not raise the money or the manpower. Then he turned to his own state militia, but discovered he did not have one. In desperation, private funds were collected to hire a volunteer army, which marched on Springfield and, with the firing of a few shots, dispersed the rebels, who fled into neighboring states.

Shays's Rebellion, occurring between the aborted Annapolis and coming Philadelphia Conventions, had a powerful effect on opinion. Delegates who might have been reluctant to attend the Philadelphia meeting, especially those from New England, were galvanized by the fear that state governments were about to collapse from internal dissension. George Washington wrote a friend despairingly: "For God's sake, if they [the rebels] have real grievances, redress them; if they have not, employ the force of government against them at once."<sup>7</sup> Thomas Jefferson, living in Paris, took a more

detached view: "A little rebellion now and then is a good thing," he wrote. "The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants."<sup>8</sup> Though Jefferson's detachment might be explained by the fact that he was in Paris and not in Springfield, there were others, like Governor George Clinton of New York, who shared the view that no strong central government was required. (Whether Clinton would have agreed about the virtues of spilled blood, especially his, is another matter.)

**The Framers**

The Philadelphia Convention attracted 55 delegates, only about 30 of whom participated regularly in the proceedings. One state, Rhode Island, refused to send anyone. The convention met during a miserably hot Philadelphia summer, with the delegates pledged to keep their deliberations secret. The talkative and party-loving Benjamin Franklin was often accompanied by other delegates, to make sure that neither wine nor his delight in telling stories would lead him to divulge delicate secrets.

Those who attended were for the most part young (Hamilton was 30; Madison, 36) but experienced. Eight delegates had signed the Declaration of Independence, seven had been governors, 34 were lawyers and reasonably well to do, a few were wealthy. They were not "intellectuals," but men of practical affairs. Thirty-nine had served in the ineffectual Congress of the Confederation; a third of all delegates were veterans of the Continental Army.

Some names made famous by the Revolution were conspicuously absent. Thomas Jefferson and John Adams were serving as ministers abroad; Samuel Adams was ill; Patrick Henry was chosen to attend but refused, commenting that he "smelled a rat in Philadelphia, tending toward monarchy."

The key men at the convention were an odd lot. George Washington was a very tall, athletic man who was the best horseman in Virginia and who impressed everyone with his dignity, despite decaying teeth and big eyes. James Madison was the very opposite: quite short with a frail body, and not much of an orator, but possessed of one of the best minds in the country. Benjamin Franklin, though old and ill, was the most famous American in the world as a scientist and writer, and always displayed shrewd judgment, at least when sober. Alexander Hamilton, the illegitimate son of a French woman and a Scottish merchant, had such a powerful mind and drive that he succeeded in everything he did—from being Washington's aide during the Revolution to serving as a splendid secretary of the treasury during Washington's presidency.

The convention produced not a revision of the Articles of Confederation, as it had been authorized to do, but a wholly new written constitution creating a true national government unlike any that had existed before. That document is today the world's oldest written national constitution. Those who wrote it were neither saints nor schemers, and the deliberations were not always lofty or philosophical—much hard bargaining, more than a little confusion, and the accidents of personality and time helped shape the final product. The delegates were split on many issues—what powers should be given to a central government, how should the states be

represented, what was to be done about slavery, what should the role of the people be—each of which was resolved by a compromise. The speeches of the delegates (known to us from the detailed notes kept by Madison) did not explicitly draw on political philosophy or quote from the writings of philosophers. Everyone present was quite familiar with the traditional arguments and, on the whole, well read in history. Though the leading political philosophers were only rarely mentioned, the debate was profoundly influenced by philosophical beliefs, some formed by the revolutionary experience and others by the 11-year attempt at self-government.

From the debates leading up to the Revolution, the delegates had drawn a commitment to liberty, which, despite the abuses sometimes committed in its name, they continued to share. Their defense of liberty as a natural right was derived from the writings of the 17th-century English philosopher John Locke.

Unlike his English rival, Thomas Hobbes, Locke did not believe that it was necessary to have an all-powerful government or that democracy was impossible. Hobbes had argued that in any society without an absolute, supreme ruler there is bound to be ceaseless, violent turmoil—a “war of all against all.” Locke disagreed. In a “state of nature,” Locke argued, all men cherish and seek to protect their life, liberty, and property. But in a state of nature—that is, a society without a government—the strong can use their liberty to deprive the weak of their own liberty. The instinct

for self-preservation leads people to want a government that will prevent this exploitation. But if the government is not itself to deprive its subjects of their liberty, it must be limited. The chief limitation, he said, should derive from the fact that it is created and governs by the consent of the governed. People will not agree to be ruled by a government that threatens their liberty; therefore, the government to which they choose freely to submit themselves will be a limited government designed to protect liberty.<sup>9</sup>

The Pennsylvania experience as well as the history of British government led the Framers to doubt whether popular consent alone would be a sufficient guarantor of liberty. A popular government may prove too weak (as in Massachusetts) to prevent one faction from abusing another, or a popular majority can be tyrannical (as in Pennsylvania). In fact, the tyranny of the majority can be an even graver threat than a rule by the few. In the former case, there may be no defenses for the individual—one lone person cannot count on the succor of public opinion or the possibility of popular revolt.

The problem, then, was a delicate one: how to devise a government strong enough to preserve order but not so strong that it would threaten liberty. The answer, the delegates believed, was not “democracy” as it was then understood. To many conservatives in the late 18th century, democracy meant mob rule—it meant, in short, Shays’s Rebellion (or, if they had been candid about it, the Boston Tea Party). On the other hand, *aristocracy*—the rule of the few—was no solution, since the few were likely to be self-serving. Madison, writing later in the *Federalist* papers, put the problem this way:

*If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*<sup>10</sup>

Striking this balance could not be done, Madison believed, simply by writing a constitution that set limits on what government could do. The example of British rule over the colonies proved that laws and customs were inadequate checks on political power. As he expressed it, “A mere demarcation on parchment of the constitutional limits [of government] is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”<sup>11</sup>

## The Challenge

The resolution of political issues, great and small, often depends crucially on how the central question is phrased. The delegates came to Philadelphia in general agreement that there were defects in the Articles of Confederation that ought to be remedied. Had they, after convening, made it their business to list these defects and debate alternative remedies



Hulton Archive/Getty Images

**IMAGE 2-2** *Shays's Rebellion in western Massachusetts in 1786–1787 stirred deep fears of anarchy in America. The ruckus was put down by a hastily assembled militia, and the rebels were eventually pardoned.*

**Virginia Plan**

Proposal to create a strong national government.

**New Jersey Plan**

Proposal to create a weak national government.

**Great Compromise**

Plan to have a popularly elected House based on state population and a state-selected Senate, with two members for each state.

for them, the document that emerged would in all likelihood have been very different from what in fact was adopted. But immediately after the convention had organized itself and chosen Washington to be its presiding officer, the Virginia delegation (led by Governor Edmund Randolph but relying heavily on the draftsmanship of James Madison) presented to the convention a comprehensive plan for a wholly new national government. The plan quickly became the major item of business at the meeting. It, and little else, was debated for the next two weeks.

If the New Jersey resolutions had been presented first and taken up as the major item of business, it is quite possible they would have become the framework for the document that finally emerged. But they were not. Offered after the convention had been discussing the Virginia Plan for two weeks, the resolutions encountered a reception very different from what they may have received if introduced earlier. The debate had the delegates already thinking in terms of a national government that was more independent of the states, and thus it had accustomed them to proposals that, under other circumstances, might have seemed quite radical. On June 19, the first decisive vote of the convention was taken: seven states preferred the Virginia Plan, three states the New Jersey Plan, and one state was split.

With the tide running in favor of a strong national government, the supporters of the small states had to shift their strategy. They now began to focus their efforts on ensuring that the small states could not be outvoted by the larger states in Congress. One way was to have the members of the lower house elected by the state legislatures rather than the people, with each state getting the same number of seats rather than seats proportional to its population.

The debate was long and feelings ran high, so much so that Benjamin Franklin, the oldest delegate present (at 81 years of age), suggested that each day's meeting begin with a prayer. It turned out that the convention could not even agree on this: Hamilton is supposed to have objected that the convention did not need "foreign aid," and others pointed out that the group had no funds with which to hire a minister. And so the argument continued.

**The Virginia Plan**

When the convention decided to make the **Virginia Plan** its agenda, it had fundamentally altered the nature of its task. The business at hand was not to be the Articles and their defects, but rather how one should go about designing a true national government. The Virginia Plan called for a strong national union organized into three governmental branches: the legislative, executive, and judicial. The legislature was to be composed of two houses—the first elected directly by the people and the second chosen by the first house from among the candidates nominated by state legislatures. The executive was to be chosen by the national legislature, as were members of a national judiciary. The executive and some members of the judiciary were to constitute a "council of revision" that could veto acts of the legislature; that veto, in turn, could be overridden by the legislature. There were other interesting details, but the key features of the Virginia Plan were two: (1) a national legislature would have supreme powers on all matters on which the separate states were not competent to act, as well as the power to veto any and all state laws; and (2) at least one house of the legislature would be elected directly by the people.

**The Compromise**

Finally, a committee was appointed to meet during the Fourth of July recess to work out a compromise, and the convention adjourned to await its report. Little is known of what went on in that committee's session, though some were later to say that Franklin played a key role in hammering out the plan that finally emerged. That compromise, the most important reached at the convention, and later called the **Great Compromise** (or sometimes the Connecticut Compromise), was submitted to the full convention on July 5 and debated for another week and a half. The debate might have gone on even longer, but suddenly the hot weather moderated, and Monday, July 16 dawned cool and fresh after a month of misery. On that day, the plan was adopted: five states were in favor, four were opposed, and two did not vote.\* Thus, by the narrowest of margins, the structure of the national legislature was set as follows:

- A House of Representatives consisting initially of 65 members apportioned among the states roughly on the basis of population and elected by the people.
- A Senate consisting of two senators from each state to be chosen by the state legislatures.

\*The states in favor were Connecticut, Delaware, Maryland, New Jersey, and North Carolina. Those opposed were Georgia, Pennsylvania, South Carolina, and Virginia. Massachusetts was split down the middle; the New York delegates had left the convention. New Hampshire and Rhode Island were absent.

**The New Jersey Plan**

As the debate continued, the representatives of New Jersey and other small states grew concerned that the convention was going to write a constitution in which the states would be represented in both houses of Congress on the basis of population. If this happened, the smaller states feared they would always be outvoted by the larger states. So, with William Paterson of New Jersey as their spokesman, they introduced a new plan. The **New Jersey Plan** proposed to amend, not replace, the old Articles of Confederation. It enhanced the power of the national government (though not as much as the Virginia Plan), but it did so in a way that left the states' representation in Congress unchanged from the Articles; each state would have one vote. Thus not only would the interests of the small states be protected, but Congress itself would remain to a substantial degree the creature of state governments.



The Great Compromise reconciled the interests of small and large states by allowing the former to predominate in the Senate and the latter in the House. This reconciliation was necessary to ensure there would be support for a strong national government from small as well as large states. It represented major concessions on the part of several groups. Madison, for one, was deeply opposed to the idea of having the states equally represented in the Senate. He saw in that a way for the states to hamstring the national government and much preferred some measure of proportional representation in both houses. Delegates from other states worried that representation on the basis of population in the House of Representatives would enable the large states to dominate legislative affairs. Although the margin by which the compromise was accepted was razor thin, it held firm. In time, most of the delegates from the dissenting states accepted it.

After the Great Compromise, many more issues had to be resolved, but by now a spirit of accommodation had developed. When one delegate proposed having Congress choose the president, another, James Wilson, proposed that the president be elected directly by the people. When neither side of that argument prevailed, a committee invented a plan for an “electoral college” that would choose the president. When some delegates wanted the president chosen for a life term, others proposed a seven-year term, and still others wanted the term limited to three years without eligibility for reelection. The convention settled on a four-year term with no bar to reelection. Some states wanted the Supreme Court picked by the Senate; others wanted it chosen by the president. They finally agreed to let the justices be nominated by the president and then confirmed by the Senate.

Finally, on July 26, the proposals that were already accepted, together with a bundle of unresolved issues, were handed over to the Committee of Detail, consisting of five delegates. This committee included Madison and Gouverneur Morris, who was to be the chief draftsman of the document that finally emerged. The committee hardly contented itself with mere “details,” however. It inserted some new proposals and made changes in old ones, drawing for inspiration on existing state constitutions and the members’ beliefs as to what the other delegates might accept. On August 6, the report—the first complete draft of the Constitution—was submitted to the convention. There it was debated item by item, revised, and amended, and on September 17 it was approved by all 12 states in attendance. (Not all *delegates* approved, however. Three, including Edmund Randolph, who first submitted the Virginia Plan, refused to sign.)

## 2-3 Ratification Debates

A debate continues to rage over whether the Constitution created, or was even intended to create, a democratic government. The answer is complex.

The Framers did not intend to create a “pure democracy”—one in which the people rule directly. For one thing, the size of the country and the distances between settlements would have made that physically impossible. But more importantly, the Framers worried that a government

in which all citizens participate directly—as in the New England town meeting—would be a government vulnerable to temporary popular passions and one in which minority rights would be insecure. They intended instead to create a **republic**, by which they meant a government in which a system of representation operates.

**republic** A government in which elected representatives make the decisions.

The Framers favored a republic over a direct democracy because they believed that government should mediate, not mirror, popular views and that elected officials should represent, not register, majority sentiments. They supposed that most citizens did not have the time, information, interest, and expertise to make reasonable choices among competing policy positions. They suspected that even highly educated people could be manipulated by demagogic leaders who played on their fears and prejudices. They knew that representative democracy often proceeds slowly and prevents sweeping changes in policy, but they cautioned that a government capable of doing great good quickly can also do great harm quickly. They agreed that majority opinion should figure in the enactment of many or most government policies, but they insisted that protection of civil rights and civil liberties—the right to a fair trial; the freedom of speech, press, and religion; or the right to vote itself—ought never to hinge on a popular vote. Above all, they embraced representative democracy because they saw it as a way to minimize the chances that power would be abused, either by a tyrannical popular majority or by self-serving officeholders.

The Framers were influenced by philosophers who had discussed democracy. Aristotle defined *democracy* as the rule of the many; that is, rule by ordinary people, most of whom would be poor. But democracy, he suggested, can decay easily into an oligarchy (rule of the rich) or a tyranny (the rule of a despot). To prevent this, a good political system will be a mixed regime, combining elements of democracy and oligarchy: most people will vote, but talented people will play a large role in managing affairs.

But, as we noted earlier in this chapter, the Framers were strongly influenced by John Locke, the 17th-century English writer who argued against powerful kings and in favor of popular dissent. In Locke’s *Second Treatise of Civil Government* (1690), he argued that people can exist in a state of nature—that is, without any ruler—so long as they can find enough food to eat and a way to protect themselves. But food may not be plentiful and, as a result, life may be poor and difficult.

The human desire for self-preservation will lead people to want a government that will enable them to own property and thereby to increase their supply of food. But unlike his English rival, Thomas Hobbes, Locke did not think it necessary to have an all-powerful government. In *Leviathan* (1651), Hobbes had argued that people live in a “war of all against all” and so an absolute, supreme ruler was essential to prevent civil war. Locke disagreed: People can get along with one another if they can own their farms securely and live off what they produce. But for that to happen, a decent government must exist with the consent of the governed and

**judicial review**

The power of the courts to declare laws unconstitutional.

**federalism**

Government authority shared by national and local governments.

**enumerated powers**

Powers given to the national government alone.

**reserved powers**

Powers given to the state government alone.

**concurrent powers**

Powers shared by the national and state governments.

be managed by majority rule. To prevent a majority from hurting a minority, Locke wrote, the government should separate its powers, with different and competing legislative and executive branches.

Thus, what the Framers tried to do in 1787 was to create a republic that would protect freedom and private property, a moderate regime that would simultaneously safeguard people and leave them alone.

In designing that republic, the Framers chose, not without argument, to have the members of the House of Representatives elected directly by the people. Some delegates did not want to go even that far. Elbridge Gerry of Massachusetts, who refused to sign the Constitution, argued that though “the people do not

want [i.e., lack] virtue,” they often are the “dupes of pretended patriots.” Roger Sherman of Connecticut agreed. But George Mason of Virginia and James Wilson of Pennsylvania carried the day when they argued that “no government could long subsist without the confidence of the people,” and this required “drawing the most numerous branch of the legislature directly from the people.” Popular elections for the House were approved: six states were in favor, two opposed.

But though popular rule was to be one element of the new government, it was not to be the only one. State legislatures, not the people, would choose the senators; electors, not the people directly, would choose the president. As we have seen, without these arrangements there would have been no Constitution at all, for the small states adamantly opposed any proposal that would have given undue power to the large ones. And direct popular election of the president clearly would have made the populous states the dominant ones. In short, the Framers wished to observe the principle of majority rule, but they felt that on the most important questions, two kinds of majorities were essential: a majority of the voters and a majority of the states.

The power of the Supreme Court to declare an act of Congress unconstitutional—**judicial review**—is also a way of limiting the power of popular majorities. It is not clear whether the Framers intended that there be judicial review, but there is little doubt that in the Framers’ minds the fundamental law, the Constitution, had to be safeguarded against popular passions. They made the process for amending the Constitution easier than it had been under the Articles, but still relatively difficult.

An amendment can be proposed either by a two-thirds vote of both houses of Congress or by a national convention

called by Congress at the request of two-thirds of the states.<sup>†</sup> Once proposed, an amendment must be ratified by three-fourths of the states, either through their legislatures or through special ratifying conventions in each state. Twenty-seven amendments have survived this process, all of them proposed by Congress and all but one (the Twenty-first Amendment) ratified by state legislatures rather than state conventions.

In short, the answer to the question of whether the Constitution brought into being a democratic government is yes, if by *democracy* one means a system of representative government based on popular consent. The degree of that consent has changed since 1787, and the institutions embodying that consent can take different forms. One form, rejected in 1787, gives all political authority to one set of representatives, directly elected by the people. (That is the case, for example, in most parliamentary regimes such as the United Kingdom, and in some city governments in the United States.) The other form of democracy is one in which different sets of officials, chosen directly or indirectly by different groups of people, share political power. (That is the case with the United States and a few other nations where the separation of powers is intended to operate.)

## Key Principles

The American version of representative democracy was based on two major principles: the separation of powers and federalism. In America, political power was to be shared by three separate branches of government; in parliamentary democracies, that power was concentrated in a single, supreme legislature. In America, political authority was divided between a national government and several state governments—**federalism**—whereas in most European systems, authority was centralized in the national government. Neither of these principles was especially controversial at Philadelphia.

The delegates began their work in broad agreement that separated powers and some measure of federalism were necessary, and both the Virginia and New Jersey plans contained a version of each. How much federalism should be written into the Constitution was quite controversial, however.

Under these two principles, governmental powers in this country can be divided into three categories. The powers given to the national government exclusively are the delegated or **enumerated powers**. They include the authority to print money, declare war, make treaties, conduct foreign affairs, and regulate commerce among the states and with foreign nations. Those given exclusively to the states are the **reserved powers** and include the power to issue licenses and to regulate commerce wholly within a state. Those shared by both the national and the state governments are called **concurrent powers** and include collecting taxes, building roads, borrowing money, and maintaining courts.

<sup>†</sup>There have been many attempts to assemble a new constitutional convention. In the 1960s, 33 states, one short of the required number, requested a convention to consider the reapportionment of state legislatures. In the 1980s, efforts were made to call a convention to consider amendments to ban abortions and to require a balanced federal budget.



## Government and Human Nature

The desirability of separating powers and leaving the states equipped with a broad array of rights and responsibilities was not controversial at the Philadelphia Convention. The Framers' experiences with British rule and state government under the Articles had shaped their view of human nature—that people would seek their own advantage in and out of politics, and that this pursuit of self-interest, unchecked, would lead some people to exploit others. Human nature was good enough to make possible a decent government based on popular consent, but it was not good enough to make it inevitable.

One solution to this problem would be to improve human nature. Ancient political philosophers such as Aristotle believed that the first task of any government was to cultivate virtue among the governed. Many Americans were of the same mind. To them, Americans first would have to become good people before they could have a good government. Samuel Adams, a leader of the Boston Tea Party, said that the new nation must become a “Christian Sparta.” Others spoke of the need to cultivate frugality, industry, temperance, and simplicity.

But to James Madison and the other architects of the Constitution, the deliberate cultivation of virtue would require a government too strong and thus too dangerous to liberty, at least at the national level. Self-interest, pursued within reasonable limits, was a more practical and durable solution to the problem of government than any effort to improve the virtue of the citizenry. He wanted, he said, to make republican government possible “even in the absence of political virtue.”

Madison argued that the very self-interest that leads people toward factionalism and tyranny might, if properly harnessed by appropriate constitutional arrangements, provide a source of unity and a guarantee of liberty. This harnessing was to be accomplished by dividing the offices of the new government among many people and giving to the holder of each office the “necessary means and personal motives to resist encroachments of the others.” In this way, “ambition must be made to counteract ambition” so that “the private interest of every individual may be a sentinel over the public rights.”<sup>12</sup>

If men were angels, all this would be unnecessary. But Madison and the other delegates insisted pragmatically on taking human nature pretty much as it was, and therefore adopted “this policy of supplying, by opposite and rival interests, the defect of better motives.”<sup>13</sup> The **separation of powers** would work, not in spite of the imperfections of human nature, but because of them. And through **checks and balances**, each branch of government would ensure that the others did not exceed their constitutional powers.

So it is with federalism as well. By dividing power between the states and the national government, one level of government can serve as a check on the other. This should provide a “double security” to the rights of the people: “The different governments will control each other, at the same time that each will be controlled by itself.”<sup>14</sup> This was especially likely to happen in America, Madison thought, because it was a large country filled with diverse interests—rich and poor, Protestant and Catholic, Northerner and Southerner, farmer and merchant, creditor and debtor. Each of these interests would constitute a **faction** that would seek its own advantage. One

faction might come to dominate government, or a part of government, in one place, and a different and rival faction might dominate it in another. The pulling and hauling among these factions would prevent any single government—say, that of New York—from dominating all of government. The division of powers among several governments would provide virtually every faction an opportunity to gain some—but not full—power.

## The Constitution and Liberty

A more difficult question is whether the Constitution created a system of government that would respect personal liberties. In fact, that is the question that was debated in the states when the document was presented for ratification. The proponents of the Constitution called themselves the **Federalists** (though they might more accurately have been called “nationalists”). The opponents came to be known as the **Antifederalists** (though they might more accurately have been called “states’ rights advocates”).<sup>15</sup> To be put into effect, the Constitution had to be approved at ratifying conventions in at least nine states. This was perhaps the most democratic feature of the Constitution: It had to be accepted, not by the existing Congress (still limping along under the Articles of Confederation), nor by the state legislatures, but by special conventions elected by the people.

Though democratic, the process established by the Framers for ratifying the Constitution was technically illegal. The Articles of Confederation, which still governed, could be amended only with the approval of all 13 state legislatures. The Framers wanted to bypass these legislatures because they feared that, for reasons of ideology or out of a desire to retain their powers, the legislators would oppose the Constitution. The Framers wanted ratification with less than the consent of all 13 states because they knew that such unanimity could not be attained. And indeed the conventions in North Carolina and Rhode Island initially did reject the Constitution.

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## The Antifederalist View

The great issue before the state conventions was liberty, not democracy. The Antifederalists, opponents of the new Constitution, had a variety of objections—but were in general

<sup>15</sup>To the delegates a truly “federal” system was one, like the New Jersey Plan, that allowed for very strong states and a weak national government. When the New Jersey Plan lost, the delegates who defeated it began using the word *federal* to describe their plan even though it called for a stronger national government. Thus men who began as “Federalists” at the convention ultimately became known as “Antifederalists” during the struggle over ratification.

**separation of powers** Constitutional authority is shared by three different branches of government.

**checks and balances** Authority shared by three branches of government.

**faction** A group with a distinct political interest.

**Federalists** Those who favor a stronger national government.

**Antifederalists** Those who favor a weaker national government.

**coalition** An alliance of groups.

united by the belief that liberty could be secure only in a small republic, in which the rulers were physically close to and closely checked by the ruled. Their central objection was stated by a group of Antifederalists at the ratifying convention in an essay published just after they had lost: “a very extensive territory cannot be governed on the principles of freedom, otherwise than by a confederation of republics.”<sup>15</sup>

These dissenters argued that a strong national government would be distant from the people and would use its powers to annihilate or absorb the functions that properly belonged to the states. Congress would tax heavily, the Supreme Court would overrule state courts, and the president would come to head a large standing army. (Since all these things have occurred, we cannot dismiss the Antifederalists as cranky obstructionists who opposed without justification the plans of the Framers.) These critics argued that the nation needed, at best, a loose confederation of states, with most of the powers of government kept firmly in the hands of state legislatures and state courts.

But if a stronger national government was to be created, the Antifederalists argued, it should be hedged about with many more restrictions than those in the constitution then under consideration. They proposed several such limitations, including narrowing the jurisdiction of the Supreme Court, checking the president's power by creating a council that would review his actions, leaving military affairs in the hands of the state militias, increasing the size of the House of Representatives so that it would reflect a greater variety of popular interests, and reducing or eliminating the power of Congress to levy taxes. And some of them insisted that a *bill of rights* be added to the Constitution.

James Madison gave his answer to these criticisms in *Federalist* No. 10 and No. 51 (reprinted in the Appendix with a reading guide). It was a bold answer, for it flew squarely in the face of widespread popular sentiment and much philosophical writing. Following the great French political philosopher Montesquieu, many Americans believed liberty was safe only in small societies governed either by direct democracy or by large legislatures with small districts and frequent turnover among members.

Madison argued quite the opposite—that liberty is safest in *large* (or as he put it, “extended”) republics. In a small community, he said, there will be relatively few differences in opinion or interest; people will tend to see the world in much the same way. If anyone dissents or pursues an individual interest, he or she will be confronted by a massive majority and will have few, if any, allies. But in a large republic there will be many opinions and interests; as a result, it will be hard for a tyrannical majority to form or organize, and anyone with an unpopular view will find it easier to acquire allies. If Madison's argument seems strange or abstract, ask yourself the following question: if I have an unpopular opinion, an exotic lifestyle, or an unconventional interest, will I find greater security living in a small town or a big city?

By favoring a large republic, Madison was not trying to stifle democracy. Rather, he was attempting to show how democratic government really works, and what can make it

work better. To rule, different interests must come together and form a **coalition**—that is, an alliance. In *Federalist* No. 51, he argued that the coalitions formed in a large republic would be more moderate than those formed in a small one. The bigger the republic, the greater the variety of interests, and thus the more a coalition of the majority would have to accommodate a diversity of interests and opinions if it hoped to succeed. He concluded that in a nation the size of the United States, with its enormous variety of interests, “a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.” Whether he was right in that prediction is a matter to which we return repeatedly.

The implication of Madison's arguments was daring, for he was suggesting that the national government should be at some distance from the people and insulated from their momentary passions because the people did not always want to do the right thing. Liberty was threatened as much (or even more) by public passions and popularly based factions as by strong governments. Now the Antifederalists themselves had no very lofty view of human nature, as is evidenced by the deep suspicion with which they viewed “power-seeking” officeholders. What Madison did was take this view to its logical conclusion, arguing that if people could be corrupted by office, they could also be corrupted by factional self-interest. Thus the government should be designed to prevent both the politicians and the people from using it for ill-considered or unjust purposes.

To argue in 1787 against the virtues of small democracies was like arguing against motherhood. Moreover, the Federalists' counterargument involved many steps: representative democracy over direct democracy; a large republic over a small republic; diversity of economic, religious, and other interests over homogeneity of such interests; and barriers, not boosts, to majority group formation and influence. Still, the Federalists prevailed, probably because many citizens were convinced that a reasonably strong national government was essential if the nation were to stand united against foreign enemies, facilitate commerce among the states, guard against domestic insurrections, and keep one faction from oppressing another. The political realities of the moment and the recent bitter experiences with the Articles probably counted for more than Madison's arguments in ratifying the Constitution. Madison's cause was helped by the fact that, for all their legitimate concerns and their uncanny instinct for what the future might bring, the Antifederalists could offer no agreed-upon alternative to the new Constitution. In politics, then as now, you cannot beat something with nothing.

But this does not explain why the Framers failed to add a bill of rights to the Constitution. If they were so preoccupied with liberty, why didn't they take this most obvious step toward protecting liberty—especially since the Antifederalists were demanding it? Some historians have suggested that this omission was evidence that liberty was not as important to the Framers as they claimed. In fact, when one delegate suggested that a bill of rights be drawn up, the state delegations at the convention unanimously voted the idea down. There were several reasons for this.

First, the Constitution, as written, *did* contain a number of specific guarantees of individual liberty, including the right of trial by jury in criminal cases and the privilege of the writ of **habeas corpus**. The liberties guaranteed in the Constitution before the Bill of Rights was added are listed later in the chapter.

- Writ of habeas corpus may not be suspended (except during invasion or rebellion).
- No **bill of attainder** may be passed by Congress or the states.
- No **ex post facto law** may be passed by Congress or the states.
- Right of trial by jury in criminal cases is guaranteed.
- The citizens of each state are entitled to the privileges and immunities of the citizens of every other state.
- No religious test or qualification for holding federal office is imposed.
- No law impairing the obligation of contracts may be passed by the states.

Second, most states in 1787 had bills of rights. When Elbridge Gerry proposed to the convention that a federal bill of rights be drafted, Roger Sherman rose to observe that it was unnecessary because the state bills of rights were sufficient.<sup>16</sup>

But third, and perhaps most important, the Framers thought they were creating a government with specific, limited powers. It could do, they thought, only what the Constitution gave it the power to do—and nowhere in that document was there permission to infringe on freedom of speech or of the press or to impose cruel and unusual punishments. Some delegates probably feared that if any serious effort were made to list the rights that were guaranteed, later officials might assume that they had the power to do anything not explicitly forbidden.

## Need for a Bill of Rights

Whatever their reasons, the Framers made at least a tactical and perhaps fundamental mistake. It became clear quickly that without at least the promise of a bill of rights, the Constitution would not be ratified. Though the small states, pleased by their equal representation in the Senate, quickly ratified (in Delaware, New Jersey, and Georgia, the vote in the conventions was unanimous), the battle in the large states was intense and the outcome uncertain. In Pennsylvania, Federalist supporters dragged boycotting Antifederalists to the legislature to ensure that a quorum was present so a convention could be called. There were rumors of other rough tactics.

In Massachusetts, the Constitution was approved by a narrow majority, but only after key leaders promised to obtain a bill of rights. In Virginia, James Madison fought against the fiery Patrick Henry, whose climactic speech against ratification was dramatically punctuated by a noisy thunderstorm outside. The Federalists won by 10 votes. In New York, Alexander Hamilton argued the case for six weeks against the determined opposition of most of the state's key political leaders; he carried the day, but only by three votes, and then only after New York City threatened to secede from the

state if it did not ratify. By June 21, 1788, the ninth state, New Hampshire, had ratified—and the Constitution was law.

Many people think that the first Congress moved quickly to adopt a **Bill of Rights**—that is, the first 10 amendments to the Constitution—in order to satisfy demands made in state ratifying conventions that this be done. Unfortunately, that is not quite right. Of the many criticisms made of the proposed Constitution, hardly any referred to civil liberties.

Take, for example, the Massachusetts convention. Several critics, including John Hancock, said they would vote to ratify the document if the new members of Congress did all they could to get nine amendments adopted. But these amendments had nothing to do with free speech or a free press. Instead, they involved the size of the House of Representatives, congressional influence on local elections, the power of Congress to impose taxes, and the need for grand juries in criminal cases.<sup>17</sup> Other speakers wanted an amendment that would have House members stand for election every year. Critics in other states made the same arguments.

Despite the bitterness of the ratification struggle, the new government that took office in 1789–1790, headed by President Washington, was greeted enthusiastically. By the spring of 1790, all 13 states had ratified. There remained, however, the task of fulfilling the promise of amending the document. To that end, James Madison introduced into the first session of the First Congress a set of proposals, 12 of which were approved by Congress; 10 of these were ratified by the states and went into effect in 1791. But with only a few exceptions, these bore no relationship to the criticisms made in the state conventions. On what, then, did Madison base them? Probably on the Virginia Declaration of Rights, written by George Mason and Madison, and approved unanimously by the Virginia legislature in 1776. These amendments, which no one called a Bill of Rights as late as 1792, did not limit the power of state governments over citizens—only the power of the federal government. Later, the Fourteenth Amendment, as interpreted by the Supreme Court, extended many of the guarantees of the Bill of Rights to cover state governmental action.

**habeas corpus** An order to produce an arrested person before a judge.

**bill of attainder** A law that declares a person, without a trial, to be guilty of a crime.

**ex post facto law** A law that makes an act criminal even though the act was legal when it was committed.

**Bill of Rights** First 10 amendments to the Constitution.

## The Constitution and Slavery

Though slaves amounted to one-third of the population of the five Southern states, nowhere in the Constitution can one find the word *slave* or *slavery*.

To some, the failure of the Constitution to address the question of slavery was a great betrayal of the promise of the Declaration of Independence that “all men are created equal.” For the Constitution to be silent on the subject of



slavery, and thereby to allow that odious practice to continue, was by implication to convert the wording of the Declaration to “all white men are created equal.”

It is easy to accuse the signers of the Declaration and the Constitution of hypocrisy. They knew of slavery, many of them owned slaves, and yet they were silent. Indeed, British opponents of the independence movement took special delight in taunting the colonists about their complaints of being “enslaved” to the British Empire while ignoring the slavery in their very midst.

Increasingly, revolutionary leaders during this period spoke to this issue. Thomas Jefferson had tried to get a clause opposing the slave trade put into the Declaration of Independence. James Otis of Boston had attacked slavery and argued that black as well as white men should be free. As revolutionary fervor mounted, so did Northern criticism of slavery. The Massachusetts legislature and then the Continental Congress voted to end the slave trade; Delaware prohibited the importation of slaves; Pennsylvania voted to tax slavery out of existence; and Connecticut and Rhode Island decided that all slaves brought into those states would automatically become free.

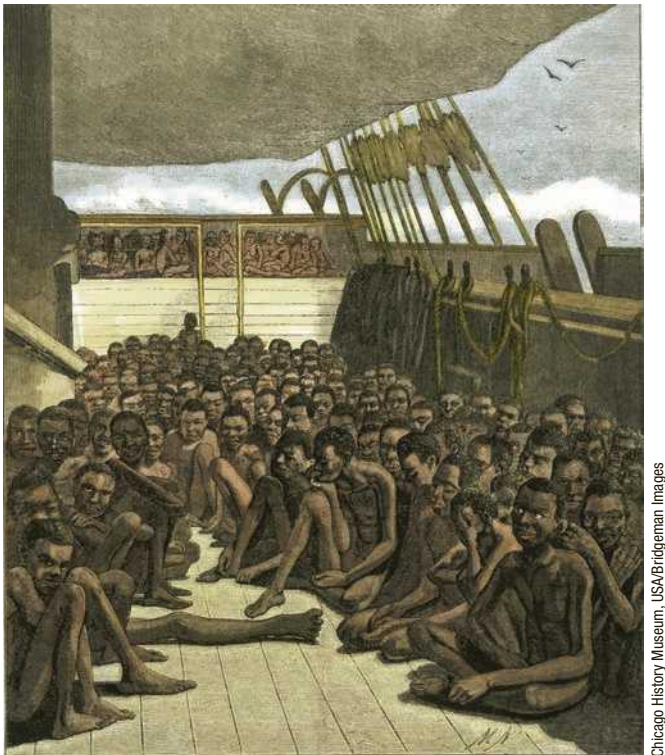
Slavery continued unabated in the South, defended by some whites because they thought it right, by others because they found it useful. But even in the South there were opponents, though rarely conspicuous ones. George Mason, a large Virginia slaveholder and a delegate to the convention, warned prophetically that “by an inevitable chain of causes and effects, providence punishes national sins [slavery] by national calamities.”<sup>18</sup>

The blunt fact, however, was that any effort to use the Constitution to end slavery would have meant the end of the

Constitution. The Southern states would never have signed a document that seriously interfered with slavery. Without the Southern states, there would have been a continuation of the Articles of Confederation, which would have left each state entirely sovereign and thus entirely free of any prospective challenge to slavery.

Thus the Framers compromised with slavery; political scientist Theodore Lowi calls this their Greatest Compromise.<sup>19</sup> Slavery is dealt with in three places in the Constitution, though never by name. In determining the representation each state was to have in the House, “three-fifths of all other persons” (i.e., of slaves) are to be added to “the whole number of free persons.”<sup>20</sup> The South originally wanted slaves to count fully even though, of course, none would be elected to the House; they settled for counting 60 percent of them. The Great (or Connecticut) Compromise favored smaller states, which were mostly Northern, by giving each state two senators; but the three-fifths compromise even more strongly favored the South’s slaveholding states. For example, apportioned according to its free population, the Southern states would have had a combined total of 33 House seats rather than the 47 they claimed. The three-fifths compromise is the primary reason why Southern-born presidents, House leaders, and Supreme Court justices generally dominated antebellum American national government.<sup>21</sup>

The convention also agreed not to allow the new government by law or even constitutional amendment to prohibit the importation of slaves until 1808.<sup>22</sup> The South thus had 20 years in which it could acquire more slaves from abroad; after that, Congress was free (but not required) to end the importation. Finally, the Constitution guaranteed that if a slave were to escape his or her master and flee to a free state, the slave would be returned by that state to “the party to whom . . . service or labour may be due.”<sup>23</sup>



Chicago History Museum, USA/Bridgeman Images

**IMAGE 2-3** *The Constitution did not address the debate about slavery, so buying and selling slaves continued for many years.*



## HOW WE COMPARE

### Does a Constitution Guarantee Freedom?

You may think that the best protection for individual freedom is for a nation to have a written constitution. After all, a constitution is supposed to limit governmental action. But if you look around the world, you will see that a constitution is not enough.

Here are three nations that do not have a written constitution and yet personal freedom is well established:

Israel   New Zealand   United Kingdom

And here are three nations with a written constitution where personal freedom is rare:

Iran   North Korea   Russia

What else must nations have in order to ensure personal freedom?

The unresolved issue of slavery was to prove the most explosive question of all. Allowing slavery to continue was a fateful decision, one that led to the worst social and political catastrophe in the nation's history—the Civil War. The Framers chose to sidestep the issue in order to create a union that, they hoped, would eventually be strong enough to deal with the problem when it could no longer be postponed. The legacy of that choice reverberates to this day.

## 2-4 Democracy and the Constitution: Post-Ratification Debates

The Framers were not saints or demigods. They were men with political opinions who also had economic interests and human failings. It would be a mistake to conclude that everything they did in 1787 was motivated by a disinterested commitment to the public good. But it would be an equally great mistake to think that what they did was nothing but an effort to line their pockets by producing a government that would serve their own narrow interests. As in almost all human endeavors, the Framers acted out of a mixture of motives. What is truly astonishing is that economic interests played only a modest role in their deliberations.

### Economic Interests

Some of the Framers were wealthy; some were not. Some owned slaves; some had none. Some were creditors (having loaned money to the Continental Congress or to private parties); some were deeply in debt. For nearly a century, scholars have argued over just how important these personal interests were in shaping the provisions of the Constitution.

In 1913, historian Charles Beard published *An Economic Interpretation of the Constitution*, which argued that the better-off urban and commercial classes—especially those members who held the IOUs issued by the government to pay for the Revolutionary War—favored the new Constitution because they stood to benefit from it.<sup>24</sup> But in the 1950s, that view was challenged by historians who, after looking carefully at what the Framers owned or owed, concluded that one could not explain the Constitution exclusively or even largely in terms of the economic interests of those who wrote it.<sup>25</sup> Some of the richest delegates, such as Elbridge Gerry of Massachusetts and George Mason of Virginia, refused to sign the document, while many of its key backers—James Madison and James Wilson, for example—were men of modest means or heavy debts.

In the 1980s, a new group of scholars, primarily economists applying more advanced statistical techniques, found evidence that some economic considerations influenced how the Framers voted on some issues during the Philadelphia Convention. Interestingly, however, the economic position of the *states* from which they came had a greater effect on their votes than did their *own* monetary condition.<sup>26</sup>

We have already seen how delegates from small states fought to reduce the power of large states and how those from slave-owning states made certain that the Constitution would contain no provision that would threaten slavery.

But contrary to what Beard asserted, the economic interests of the Framers themselves did not dominate the convention. Some delegates owned a lot of public debt they had purchased for low prices. A strong national government of the sort envisaged by the Constitution was more likely than the weak Continental Congress to pay off this debt at face value, thus making the delegates who owned it much richer. Despite this, the ownership of public debt had no significant effect on how the Framers voted in Philadelphia. Nor did the big land speculators vote their interests. Some, such as George Washington and Robert Morris, favored the Constitution, while others, such as George Mason and William Blount, opposed it.<sup>27</sup>

In sum, the Framers tended to represent their states' interests on important matters. Since they were picked by the states to do so, this is exactly what one would expect. If they had not met in secret, perhaps they would have voted even more often as their constituents wanted. With the grave and enormous exception of slavery, the Framers usually did not vote their own respective economic interests.

At the popularly elected state ratifying conventions, economic factors played a larger role. Delegates who were merchants, who lived in cities, who owned large amounts of western land, who held government IOUs, and who did not own slaves were more likely to vote to ratify the new Constitution than delegates who were farmers, who did not own public debt, and who did own slaves.<sup>28</sup> There were plenty of exceptions, however. Small farmers dominated the conventions in some states where the vote to ratify was unanimous.

Though interests made a difference, they were not simply elite interests. In most states, the great majority of adult white males could vote for delegates to the ratifying conventions. This means that women and blacks were excluded from the debates, but by the standards of the time—standards that did not change for over a century—the ratification process was remarkably democratic.

### The Constitution and Equality

Ideas counted for as much as interests. At stake were two views of the public good. One, espoused by the Federalists, was that a reasonable balance of liberty, order, and progress required a strong national government. The other, defended by the Antifederalists, was that liberty would not be secure in the hands of a powerful, distant government; freedom required decentralization.

Today that debate has a new focus. The defect of the Constitution, to some contemporary critics, is not that the government it created is too strong but that it is too weak. In particular, the national government is too weak to resist the pressures of special interests that reflect and perpetuate social inequality.

This criticism reveals how our understanding of the relationship between liberty and equality has changed since the Founding. To Jefferson and Madison, citizens naturally differed in their talents and qualities. What had to be guarded against was the use of governmental power to create unnatural and undesirable inequalities. This might happen, for example, if political power was concentrated in the hands of a few people (who could use that power to give themselves



special privileges) or if it was used in ways that allowed some private parties to acquire exclusive charters and monopolies. To prevent the inequality that might result from having too strong a government, its powers must be kept strictly limited.

Today, some people think of inequality quite differently. To them, it is the natural social order—the marketplace and the acquisitive talents of people operating in that marketplace—that leads to undesirable inequalities, especially in economic power. The government should be powerful enough to restrain these natural tendencies and produce, by law, a greater degree of equality than society allows when left alone.

To the Framers, liberty and (political) equality were not in conflict; to some people today, these two principles are deeply in conflict. To the Framers, the task was to keep government so limited as to prevent it from creating the worst inequality—political privilege. To some modern observers, the task is to make government strong enough to reduce what they believe is the worst inequality—differences in wealth.

## Constitutional Reform: Modern Views

Almost from the day it was ratified, the Constitution has been the object of debate over ways in which it might be improved. These debates have rarely involved the average citizen, who tends to revere the document even if he or she cannot recall all its details. Because of this deep and broad popular support, scholars and politicians have been wary of attacking the Constitution or suggesting many wholesale changes. But such attacks have occurred. During the 1980s—the decade in which we celebrated the bicentennial of its adoption—we heard a variety of suggestions for improving the Constitution, ranging from particular amendments to wholesale revisions. In general there are today, as in the 18th century, two kinds of critics: those who think the federal government is too weak and those who think it is too strong.

## Reducing the Separation of Powers

To the first kind of critic, the chief difficulty with the Constitution is the separation of powers. By making every decision the uncertain outcome of the pulling and hauling between the president and Congress, the Constitution precludes the emergence—except perhaps in times of crisis—of the kind of effective national leadership the country needs. In this view, our nation today faces a number of challenges that require prompt, decisive, and comprehensive action. Our problem is gridlock. Our position of international leadership, the dangerous and unprecedented proliferation of nuclear weapons among the nations of the globe, and the need to find ways of stimulating economic growth while reducing our deficit and conserving our environment—all these situations require the president be able to formulate and carry out policies free of some of the pressures and delays from interest groups and members of Congress tied to local interests.

Not only would this increase in presidential authority make for better policies, these critics argue, it would also help the voters hold the president and his party accountable for their actions. As matters now stand, nobody in government can be held responsible for policies: Everyone takes the

credit for successes and no one is willing to take the blame for failures. Typically, the president, who tends to be the major source of new programs, cannot get his policies adopted by Congress without long delays and much bargaining, the result of which often is some watered-down compromise that neither the president nor Congress really likes but that each must settle for if anything is to be done at all.

Finally, critics of the separation of powers complain that the government agencies responsible for implementing a program are exposed to undue interference from legislators and special interests. In this view, the president is supposed to be in charge of the bureaucracy but in fact must share this authority with countless members of Congress and congressional committees.

Not all critics of the separation of powers agree with all these points, nor do they all agree on what should be done about the problems. But they all have in common a fear that the separation of powers makes the president too weak and insufficiently accountable. Their proposals for reducing the separation of powers include the following:

- Allow the president to appoint members of Congress to serve in the cabinet (the Constitution forbids members of Congress from holding any federal appointive office while in Congress).
- Allow the president to dissolve Congress and call for a special election (elections now can be held only on the schedule determined by the calendar).
- Allow Congress to require a president who has lost its confidence to face the country in a special election before his term would normally end.
- Require the presidential and congressional candidates to run as a team in each congressional district; thus a presidential candidate who carries a given district could be sure the congressional candidate of his party would also win in that district.
- Have the president serve a single six-year term instead of being eligible for up to two four-year terms; this would presumably free the president to lead without having to worry about reelection.
- Lengthen the terms of members of the House of Representatives from two to four years so that the entire House would stand for reelection at the same time as the president.<sup>29</sup>

Some of these proposals are offered by critics out of a desire to make the American system of government work more like the British parliamentary system, in which, as we see in Chapters 13 and 14, the prime minister is the undisputed leader of the majority in the British Parliament. The parliamentary system is the major alternative in the world today to the American separation-of-powers system.

Both the diagnoses and the remedies proposed by these critics of the separation of powers have been challenged. Many defenders of our present constitutional system believe that nations such as the United Kingdom, with a different, more unified political system, have done no

better than the United States in dealing with the problems of economic growth, national security, and environmental protection. Moreover, they argue, close congressional scrutiny of presidential proposals has improved these policies more often than it has weakened them. Finally, congressional “interference” in the work of government agencies is a good way of ensuring that the average citizen can fight back against the bureaucracy; without that so-called interference, citizens and interest groups might be helpless before big and powerful agencies.

Each of the specific proposals, defenders of the present constitutional system argue, would either make matters worse or have uncertain effects at best. Adding a few members of Congress to the president’s cabinet would not provide much help in getting his program through Congress; there are 535 senators and representatives, and probably only about half a dozen would be in the cabinet. Giving either the president or Congress the power to call a special election in between the regular elections (every two or four years) would cause needless confusion and great expense; the country would live under the threat of being in a perpetual political campaign with even weaker political parties. Linking the fate of the president and congressional candidates by having them run as a team in each district would reduce the stabilizing and moderating effect of having them elected separately. A Republican presidential candidate who wins in the new system would have a Republican majority in the House; a Democratic candidate winner would have a Democratic majority. We might as a result expect dramatic changes in policy as the political pendulum swung back and forth. Giving presidents a single six-year term would indeed free them from the need to worry about reelection, but it is precisely that worry that keeps presidents reasonably concerned about what the American people want.

## Making the System Less Democratic

The second kind of critic of the Constitution thinks the government does too much, not too little. Though the separation of powers at one time may have slowed the growth of government and moderated the policies it adopted, in the last few decades government has grown helter-skelter. The problem, these critics argue, is not that democracy is a bad idea but that democracy can produce bad—or at least unintended—results if the government caters to the special-interest claims of the citizens rather than to their long-term values.

To see how these unintended results might occur, imagine a situation in which every citizen thinks the government grows too big, taxes too heavily, and spends too much. Each citizen wants the government made smaller by reducing the benefits other people get—but not by reducing the benefits he or she gets. In fact, such citizens may even be willing to see their own benefits cut, provided everyone else’s benefits are cut as well, and by a like amount.

But the political system attends to individual wants, not general preferences. It gives aid to farmers, contracts to industry, grants to professors, pensions to older adults, and loans to students. As someone once said, the government is like an adding machine: During elections, candidates

campaign by promising to do more for whatever group is dissatisfied with what the incumbents are doing for it. As a result, most elections bring to office men and women committed to doing more for somebody. The grand total of all these additions is more for everybody. Few politicians have an incentive to do less for anybody.

To remedy this state of affairs, these critics suggest various mechanisms, but principally a constitutional amendment that would either set a limit on the amount of money the government could collect in taxes each year, or require that each year the government have a balanced budget (i.e., not spend more than it takes in in taxes), or both. In some versions of these plans, an extraordinary majority (say, 60 percent) of Congress could override these limits, and the limits would not apply in wartime.

The effect of such amendments, the proponents claim, would be to force Congress and the president to look at the big picture—the grand total of what they are spending—rather than just to operate the adding machine by pushing the “add” button over and over again. If they could spend only so much during a given year, they would have to allocate what they spend among all rival claimants. For example, if more money were to be spent on the poor, less could then be spent on the military, or vice versa.

Some critics of an overly powerful federal government think these amendments will not be passed or may prove unworkable; instead, they favor enhancing the president’s power to block spending by giving him a **line-item veto**. Most state governors can veto a particular part of a bill and approve the rest in this way. The theory is that such a veto would better equip the president to stop unwarranted spending without vetoing the other provisions of a bill.

In 1996, President Clinton signed the Line Item Veto Act, passed by the 104th Congress. But despite its name, the new law did not give the president full line-item veto power (only a change in the Constitution could confer that power). Instead, the law gave the president authority to eliminate individual items selectively in large appropriations bills, expansions in certain income-transfer programs, and tax breaks (giving the president what budget experts call *enhanced rescission authority*). But it also left Congress free to craft bills in ways that would give the president few opportunities to veto (or *rescind*) favored items. For example, Congress could still force the president to accept or reject an entire appropriations bill simply by tagging on this sentence: “Appropriations provided under this act (or title or section) shall not be subject to the provisions of the Line Item Veto Act.”

In *Clinton et al. v. New York et al.* (1998), the Supreme Court struck down the 1996 law, holding six to three that the Constitution does not allow the president to cancel specific items in tax and spending legislation. Clinton’s successor, President George W. Bush, championed the line-item veto, but to no avail; and, when asked about the line-item veto in February 2009, President Barack Obama’s press secretary, Robert Gibbs, quipped that the new president would “love to take that for a test drive.”

### **line-item veto**

An executive’s ability to block a particular provision in a bill passed by the legislature.



## CONSTITUTIONAL CONNECTIONS

### Women and the Constitution

Women were mentioned nowhere in the Constitution when it was written in 1787. Moreover, Article I, which set forth the provisions for electing members of the House of Representatives, granted the vote to those people who were allowed to vote for members of the lower house of the legislature in the states in which they resided. In no state at the time could women participate in those elections. In no state could they vote in any elections or hold any offices. Furthermore, wherever the Constitution uses a pronoun, it uses the masculine form—*he* or *him*.

**In another sense, no:** Wherever the Constitution or the Bill of Rights defines a right that people are to have, it either grants that right to “persons” or “citizens,” not to “men,” or it makes no mention at all of people or gender. For example:

- “The *citizens* of each State shall be entitled to all privileges and immunities of citizens of the several States.”

[Art. I, sec. 9]

- “No *person* shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

[Art. III, sec. 3]

- “No bill of attainder or ex post facto law shall be passed.”

[Art. I, sec. 9]

- “The right of the *people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

[Amend. IV]

- “No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury . . . nor shall any *person* be subject for the same offense to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law.”

[Amend. V]

- “In all criminal prosecutions the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury.”

[Amend. VI]

Moreover, when the qualifications for elective office are stated, the word *person*, not *man*, is used.

- “No *person* shall be a Representative who shall not have attained to the age of twenty-five years.”

[Art. I, sec. 2]

- “No *person* shall be a Senator who shall not have attained to the age of thirty years.”

[Art. I, sec. 3]

- “No *person* except a natural born citizen . . . shall be eligible to the office of President; neither shall any *person* be eligible to that office who shall not have attained to the age of thirty-five years.”

[Art. II, sec. 1]

In places, the Constitution and the Bill of Rights used the pronoun *he*, but always in the context of referring back to a *person* or *citizen*. At the time, and until quite recently, the male pronoun was often used in legal documents to refer generically to both men and women.

Thus, though the Constitution did not give women the right to vote until the Nineteenth Amendment was ratified in 1920, it did use language that extended fundamental rights, and access to office, to women and men equally.

Of course, what the Constitution permitted did not necessarily occur. State and local laws denied women rights that in principle they ought to have enjoyed.

Except for a brief period in New Jersey, no women voted in statewide elections until, in 1869, they were given the right to cast ballots in territorial elections in Wyoming.

When women were first elected to Congress, there was no need to change the Constitution; nothing in it restricted office-holding to men.

- When women were given the right to vote by constitutional amendment, it was not necessary to amend any existing language in the Constitution because nothing in the Constitution itself denied women the right to vote; the amendment simply added a new right: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of sex.”

[Amend. XIX]

**Source:** Adapted from Robert Goldwin, “Why Blacks, Women and Jews Are Not Mentioned in the Constitution,” *Commentary* (May 1987): 28-33.

Finally, some critics of a powerful government feel that the real problem arises not from an excess of “adding-machine” democracy but from the growth in the power of the federal courts, as described in Chapter 12. These critics would like to devise a set of laws or constitutional amendments that would narrow the authority of federal courts.

The opponents of these suggestions argue that constitutional amendments to restrict the level of taxes or to require a balanced budget are unworkable, even assuming—which they do not—that a smaller government is desirable. There is no precise, agreed-upon way to measure how much the government spends or to predict in advance how much it will receive in taxes during the year; thus, defining and enforcing a “balanced budget” is no easy matter. Since the government can always borrow money, it might easily evade any spending limits. It has also shown great ingenuity in spending money in ways that never appear as part of the regular budget.

The line-item veto may or may not be a good idea. Unless the Constitution is amended to permit it, future presidents will have to do without it. The states, where some governors have long had the veto, are quite different from the federal government in power and responsibilities. Whether a line-item veto would work as well in Washington, D.C. as it does in many state capitals is something that we simply may never know.

Finally, proposals to curtail judicial power are thinly veiled attacks, the opponents argue, on the ability of the courts to protect essential citizens’ rights. If Congress and the people do not like the way the Supreme Court has interpreted the Constitution, they can always amend the Constitution to

change a specific ruling; there is no need to adopt some across-the-board limitation on court powers.

## Who Is Right?

Some of the arguments of these two sets of critics of the Constitution may strike you as plausible or even entirely convincing. Whatever you may ultimately decide, decide nothing for now. One cannot make or remake a constitution based entirely on abstract reasoning or unproven factual arguments. Even when the Constitution was first written in 1787, it was not an exercise in abstract philosophy but rather an effort to solve pressing, practical problems in light of a theory of human nature, the lessons of past experience, and a close consideration of how governments in other countries and at other times had worked.

Just because the Constitution is more than 200 years old does not mean it is out of date. The crucial questions are these: How well has it worked over the long sweep of American history? How well has it worked compared to the constitutions of other democratic nations?

The only way to answer those questions is to study American government closely—with special attention to its historical evolution and to the practices of other nations. That is what this book is about. Of course, even after close study, people will still disagree about whether our system should be changed. People want different things and evaluate human experience according to different beliefs. But if we first understand how the government works and why it has produced the policies it has, we can then argue more intelligently about how best to achieve our wants and give expression to our beliefs.



Brendan Hoffman/Getty Images

**IMAGE 2-4** People write on a large copy of the U.S. Constitution in Washington, D.C., bringing their perspective on the relevance of the 18th-century document today.



## LEARNING OBJECTIVES .....

### 2-1 Explain how evolving debates about liberty led from the Revolutionary War to the Constitutional Convention.

The 13 colonies declared independence from Great Britain to protect their liberty—that is, their freedom to pursue their interests without undue and unfair interference from the monarch. After the Revolutionary War, the Articles of Confederation established a national government with limited powers in the new republic. But those powers did not ensure sufficient authority for governmental action, so the Constitutional Convention was called to strengthen the national political system while protecting states' rights and individual liberty.

### 2-2 Discuss the major proposals and compromise over representation in the Constitutional Convention.

The delegates to the Constitutional Convention debated two major plans over representation in the national legislature. The Virginia Plan proposed allocating seats based on population, while the New Jersey Plan proposed allocating equal seats to each state. The Connecticut Compromise created a bicameral legislature with seats allocated by population in one chamber (House) and two seats given to each state in the other chamber (Senate).

### 2-3 Summarize the key issues presented by Federalists and Antifederalists in ratification debates for the Constitution.

The Federalists argued for a strong national government that would control factions, limit public participation in governance primarily to voting, and empower elected officials to decide which policies would be in the public interest. The Antifederalists were concerned about giving too much power to the national government, and favored increased political participation in state and local governance, as well as a Bill of Rights to ensure that the national government did not encroach upon individual rights.

### 2-4 Discuss continuing debates about democracy and the Constitution.

From the time the Constitution was drafted, people have debated how effectively it promotes democratic governance. In the twenty-first century, critics typically have two overarching, and opposing, perspectives: the American political system does too little, or the system does too much. Some critics argue for reducing the separation of powers in the American political structure to make the government more efficient and effective. Other critics say the federal government needs to reevaluate priorities and reduce spending sharply to focus only on policies that are clearly in the national interest.

## TO LEARN MORE .....

To find historical and legal documents:

<http://TeachingAmericanHistory.org>

National Constitution Center: [www.constitutioncenter.org](http://www.constitutioncenter.org)

Congress: <http://thomas.loc.gov/home/thomas.php>

To look at court cases about the Constitution: Cornell University: [www.law.cornell.edu/supct](http://www.law.cornell.edu/supct)

Bailyn, Bernard. *The Ideological Origins of the American Revolution*. Cambridge, MA: Harvard University Press, 1967. A brilliant account of how the American colonists formed and justified the idea of independence.

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2010. Not only is this a marvelous study of ratification, but it also is virtually the only one in existence. A splendid, comprehensive account.

McDonald, Forrest. *Novus Ordo Seclorum*. Lawrence: University of Kansas Press, 1985. A careful study of the intellectual origins of the Constitution. The Latin title means “New World Order,” which is what the Framers hoped they were creating.

Sheldon, Garrett W. *The Political Philosophy of James Madison*. Baltimore: Johns Hopkins University Press, 2001. Masterful account of Madison's political thought and its roots in classical republicanism and Christianity.

Storing, Herbert J. *What the Anti-Federalists Were For*. Chicago: University of Chicago Press, 1981. Close analysis of the political views of those opposed to the ratification of the Constitution.

Sundquist, James L. *Constitutional Reform and Effective Government*, rev. ed. Washington, D.C.: Brookings Institution Press, 1992. Systematic evaluation of



proposals to incorporate features of parliamentary democracy in the American political system.

Wood, Gordon S. *The Creation of the American Republic*. Chapel Hill: University of North Carolina Press, 1969. A detailed study of American political thought before the Philadelphia Convention.

*The Radicalism of the American Revolution*. New York: Knopf, 1992. Magisterial study of the nature and effects of the American Revolution and the relationship between the socially radical Revolution and the Constitution.



MANDEL NGAN/Getty Images

## CHAPTER 3

# Federalism

### LEARNING OBJECTIVES

- 3-1** Discuss the historical origins of federalism, and explain how it has evolved over time.
- 3-2** Summarize the pros and cons of federalism in the United States.
- 3-3** Describe how funding underlies federal–state interactions and how this relationship has changed over time.
- 3-4** Discuss whether the devolution of programs to the states beginning in the 1980s really constitutes a revolution in federal–state relations.

## THEN

When the Framers drafted the Constitution, the Antifederalists opposed it primarily on the grounds that it gave too much power to the national government. The Antifederalists recognized the limitations of the Articles of Confederation, but they feared that the Constitution sacrificed liberty and civic responsibility with its expansion of the power of the national government.

## NOW

The Federalists prevailed over the Antifederalists with the ratification of the Constitution. Amended only 27 times in more than 225 years, the Constitution is still the law of the land today. However, much as the Antifederalists predicted, the federal government has taken on responsibilities that were traditionally the province of state governments, such as social welfare policy, education, health care, and a minimum wage. States have some flexibility in implementing policies, but the national government sets the direction in many more policy areas today than it did originally; and, as the Antifederalists feared, we now have a large standing army and powerful federal courts.

These changes do not mean that the Constitution was wrong (if forced to take sides, we would have sided with the Federalists—would you?). But there is no denying that the federal government has grown far beyond anything that even the most ardent Federalists had envisioned. Much of that growth has occurred in just the last half-century or so. In 2010, the federal government spent roughly \$4 trillion (and has continued to spend at roughly that level since then). Adjusted for inflation, that was more than five times what it spent in 1960.

But that is only about half of the story. Over the last half-century, state and local government spending has risen steeply, too. In 2010, state and local governments spent a combined total of nearly \$2.5 trillion (and since then, the amounts have continued to rise). Adjusted for inflation, that was nearly six times what they spent in 1960.

No less telling, virtually all of the post-1960 growth in government employees has been concentrated not in Washington, but in state capitals and city halls. The federal government's full-time civilian (nonmilitary) workforce numbers about 2 million (about the same number as in 1960), whereas state and local governments employ a combined total of about 12 million full-time workers (more than double the number they employed in 1960).

Back when the Federalists and the Antifederalists debated the Constitution, neither side anticipated that what today we call "big government" would encompass all three levels of government: federal, state, and local. Then, they fussed and fought over how vast the federal government might someday become. Now, apart from military affairs and international diplomacy, most "national" laws, policies, and programs are shaped, administered, or funded in whole or in part through a complex, often contentious system of federal-state relations.

## 3-1 Why Federalism Matters

The heated controversies that surrounded the enactment of the federal health reform law in 2010, and the ensuing legal challenge to that law, are in large part battles over how the federal government should relate to the states. To be sure, not all of the debate over Obamacare (also known as the Patient Protection and Affordable Care Act) centers on federal-state relations. For example, there was a contentious debate over the individual mandate, which requires everyone to have health insurance or pay a penalty. But much of the ongoing controversy over the law centers on federal-state relations. For instance, states had to expand Medicaid or risk losing funding for the program. (Medicaid assists low-income women, children, families, and the disabled in obtaining medical care; we discuss this program more in Chapter 13.)

Many federal-state conflicts have ended up before the U.S. Supreme Court (for a short list, see the Landmark Cases feature on p. 43), and this one did, too. In *National Federation of Business v. Sebelius* (2012), the Court, by a five-to-four majority led by Chief Justice John Roberts, held that the individual mandate was constitutional because it could be construed as a "tax" that was clearly within the power of Congress to levy taxes. But the Court also held the law's Medicaid expansion—which forced states to expand Medicaid or lose *all* of their Medicaid funding—was overly coercive and unconstitutional. Since then, some states have chosen to expand Medicaid under the Affordable Care Act, while others have not.

In 2015, the Supreme Court once again took up how the states and federal government relate to one another under the Affordable Care Act. In *King v. Burwell* (2015), the court ruled on whether the federal government could issue subsidies only for health insurance purchased on state-run exchanges, or whether it could also provide them for the federally run exchange. Because all citizens must have health insurance due to the individual mandate, the federal government authorized states to set up exchanges where citizens could purchase health insurance. Furthermore, the federal government provides subsidies to individuals purchasing insurance through these exchanges (to make insurance more affordable for lower- and middle-income Americans). Fourteen states opted to set up their own exchanges, but for citizens in the other 36 states, the federal government fully or partially runs an exchange for them.

As written, the Affordable Care Act only allows the government to provide subsidies to the state-level exchanges, and the plaintiffs in the case argued that providing the subsidies to those using the federally run exchanges is illegal. The Court rejected this more narrow interpretation, and decided that all citizens—regardless of whether they purchased insurance through a state-run or federally run exchange—could receive government subsidies. These are just two of the most recent in a series of cases stretching back to the start of the republic in which the Court, in effect, refereed disputes relating to "federalism."



***federalism***

Government authority shared by national and local governments.

States, but other subnational governments in the case of federal systems including Australia, India, and Switzerland). Constitutionally, in America's federal system, state governments have a specially protected existence and the authority to make final decisions over many governmental activities. Even today, despite considerable expansion of federal authority over time, state and local governments are not mere junior partners in deciding important public policy matters. The national government can pass laws to protect the environment, store nuclear waste, expand low-income housing, guarantee the right to an abortion, provide special services for the handicapped, or toughen public-school graduation standards. But whether and how such federal laws are followed or funded often involves decisions by diverse state and local government officials, both elected and appointed. Policy passed in Washington, D.C. must be implemented in state capitals—and local governments—across the country.

Federalism or federal-state relations may seem like an arcane or boring subject until you realize that it is behind many things that matter to many people: how much you pay in certain taxes, whether you can drive above 55 miles per hour on certain roadways, whether or where you can buy liquor, how strictly pollution is regulated, how much money gets spent on schools, whether all or most children have health insurance coverage, and much more. For instance, as summarized in the Constitutional Connections feature on p. 39, federalism is at the heart of many of the

**Federalism** can be defined as a political system in which the national government shares power with local governments (state governments in the case of the United

controversies surrounding the Affordable Care Act. By the same token, federalism affects almost every aspect of crime and punishment in America: persons convicted of murder are subject to the death penalty in some states but not in others; penalties for illegal drug sales vary widely from state to state; and, while some states allow the legal use of marijuana for medicinal or even recreational purposes, it remains illegal under federal law. Perhaps most importantly, federalism is critical to how certain civil liberties (Chapter 4) and civil rights (Chapter 5) are defined and protected: for instance, some state constitutions mention God, and some state laws specifically prohibit funding for religious schools.

Federalism matters, but how it matters has changed over time. In 1908, Woodrow Wilson observed that the relationship between the national government and the states “is the cardinal question of our constitutional system,” a question that cannot be settled by “one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.”<sup>1</sup>

Since the adoption of the Constitution in 1787, the single most persistent source of political conflict has been the relations between the national and state governments. The political conflict over slavery, for example, was intensified because some state governments condoned or supported it, while others took action to discourage it. The proponents and opponents of slavery thus were given territorial power centers from which to carry on the dispute. Other issues, such as the regulation of business and the provision of social welfare programs, were in large part fought out, for well over a century, in terms of “national interests” versus “states’ rights.” While other nations, such as Great Britain, were debating the question of whether the national government *ought* to



Bill Clark/CQ Roll Call/Getty Images

**IMAGE 3-1** After the passage of the 2010 health care law, critics declared that it would require thousands of pages of rules and regulations for implementation.





## CONSTITUTIONAL CONNECTIONS

### Obamacare, the Individual Mandate, and Medicaid Expansion

The Patient Protection and Affordable Care Act (Obamacare) is one of the most fundamental transformations of American health care in recent decades. But it is also one of the most controversial policies in recent years and has generated several key constitutional rulings from the Supreme Court.

For example, in *National Federation of Business v. Sebelius* (2012), the Court ruled that Congress did not have the power to impose the individual mandate under the commerce clause, but did have that power under the constitution's tax and spending clause (the first clause of Article 1, Section 8). Because Congress has the power to tax under the Constitution, the Court argued, it has the power to force people to buy insurance or pay a tax (the heart of the individual mandate).

However, in that same decision, the Court ruled that the federal government did not have the power to force states to expand Medicaid. Under Obamacare, the states had to expand Medicaid (the federal-state joint program to provide health care

to the poor and disabled) or lose *all* of their Medicaid funds. The Court held this was not constitutional. The Court argued (based on previous decisions) that the same spending clause of the Constitution gives Congress the power to attach conditions to the receipt of federal funds. But it also held that such conditions must not be coercive, and it argued that this condition—expand Medicaid or lose all Medicaid funds—was coercive (and hence prohibited). The court did not, however, establish a clear standard for what constitutes coercive; it merely held that this law was coercive.

In *King v. Burwell* (2015), the Court held that citizens using both the state-level and the federally run exchanges were eligible to receive subsidies. While this ruling left the insurance subsidies in place, it did not settle the debate over the Affordable Care Act. The debate over the Act, and how best to provide health care, will continue into the future, as we discuss in later chapters.

provide old-age pensions or regulate the railroads, the United States debated a different question—whether the national government *had the right* to do these things.

### The Founding

The goal of the Founders seems clear: Federalism was one device whereby personal liberty was to be protected. (The separation of powers was another.) The Founders feared that placing final political authority in any one set of hands, even in the hands of persons popularly elected, would so concentrate power as to risk tyranny. But they had seen what happened when independent states tried to form a compact, as under the Articles of Confederation; what the states put together, they could also take apart. The alliance among the states that existed from 1776 to 1787 was a confederation—that is, a system of government in which the people create state governments, which in turn create and operate a national government (see Figure 3-1). Since the national government in a confederation derives its powers from the states, it is dependent on their continued cooperation for its survival. By 1786, that cooperation was barely forthcoming.

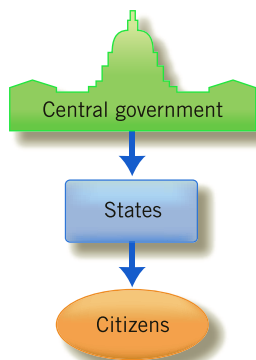
### A Bold, New Plan

A federation—or a “federal republic,” as the Founders called it—derives its powers directly from the people, as do the state governments. As the Founders envisioned it, both the national and state levels of government would have certain powers, but neither would have supreme authority over the other. James Madison, writing in *Federalist* No. 46, said that both the state and federal governments “are in fact but different agents and trustees of the people, constituted with different powers.” In *Federalist* No. 28, Alexander Hamilton

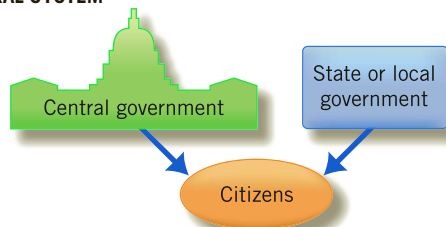
explained how he thought the system would work: The people could shift their support between state and federal levels of government as needed to keep the two in balance. “If their rights are invaded by either, they can make use of the other as the instrument of redress.”

It was an entirely new plan, for which no historical precedent existed. Nobody came to the Philadelphia Convention with a clear idea of what a federal (as opposed to a unitary or a confederal) system would look like, and there was not much discussion at Philadelphia of how the system would work in practice. Few delegates then used the word *federalism* in the sense in which we now employ it (it was originally used as a synonym for *confederation* and only later came to stand for something different).<sup>2</sup> The Constitution does not spell out the powers that the states are to have; until the Tenth Amendment was added at the insistence of various states, there was not even a clause in it saying (as did the amendment) that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” The Founders assumed from the outset that the federal government would have only those powers given to it by the Constitution; the Tenth Amendment was an afterthought, added to make that assumption explicit and allay fears that something else was intended.<sup>3</sup>

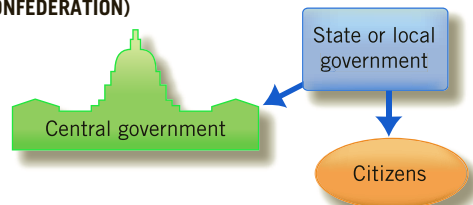
The Tenth Amendment rarely has had much practical significance, however. From time to time, the Supreme Court has tried to interpret that amendment as putting certain state activities beyond the reach of the federal government, but usually the Court has later changed its mind and allowed Washington to regulate such matters. For example, while the Court initially ruled that the federal government could not regulate the hours worked by employees of a city-owned mass

**FIGURE 3-1** Lines of Power in Three Systems of Government**UNITARY SYSTEM**

Power centralized.  
State or regional governments derive authority from central government. Examples: United Kingdom, France.

**FEDERAL SYSTEM**

Power divided between central and state or local governments.  
Both the government and constituent governments act directly upon the citizens.  
Both must agree to constitutional change.  
Examples: Canada, United States since adoption of Constitution.

**CONFEDERAL SYSTEM (or CONFEDERATION)**

Power held by independent states.  
Central government is a creature of the constituent governments.  
Example: United States under the Articles of Confederation.

transit system, it later reversed course and decided that the federal government could do that. The Court reasoned that running such a transportation system was not one of the powers “reserved to the states,” and hence could be regulated by the federal government.<sup>4</sup> But, as we explain later in this chapter, the Court has begun to give new life to the Tenth Amendment and the doctrine of state sovereignty in recent years.

## Elastic Language

The need to reconcile the competing interests of various factions at the convention—large versus small states, southern versus northern states—was difficult enough without trying to spell out the exact relationship between the state and

national governments. For example, Congress was given the power to regulate commerce “among the several states.” The Philadelphia Convention would have gone on for four years rather than four months if the Founders had decided that it was necessary to describe, in clear language, how one was to tell where commerce *among* the states ended and commerce wholly *within* a single state began. The Supreme Court, as we shall see, devoted more than a century to that task before giving up.

Though some clauses bearing on federal–state relations were reasonably clear, other clauses were quite vague. The Founders realized, correctly, that they could not make an exact and exhaustive list of everything the federal government was empowered to do—circumstances would change, and new exigencies would arise. Thus they added the following elastic language to Article I: Congress shall have the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”

The Founders themselves carried away from Philadelphia different views of what federalism meant. One view was championed by Hamilton. Since the people had created the national government, since the laws and treaties made pursuant to the Constitution were “the supreme law of the land” (Article VI), and since the most pressing needs were the development of a national economy and the conduct of foreign affairs, Hamilton thought that the national government was the superior force in political affairs and that its powers ought to be broadly defined and liberally construed.

The other view, championed by Thomas Jefferson, was that the federal government, though important, was the product of an agreement among the states; and though “the people” were the ultimate sovereigns, the principal threat to their liberties was likely to come from the national government. Thus, the powers of the federal government should be narrowly construed and strictly limited.

Madison, a strong supporter of national supremacy at the convention, later became a champion of states’ rights. As Madison put it in *Federalist* No. 45, in language that probably made Hamilton wince, “The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”

Hamilton argued for national supremacy, Jefferson for states’ rights. Though their differences were greater in theory than in practice—as we shall see in Chapter 10, Jefferson while president sometimes acted in a positively Hamiltonian manner—the differing interpretations they offered of the Constitution continue to shape political debate even today.

## The Debate on the Meaning of Federalism

Since Hamilton and Jefferson fought over states’ rights more than two centuries ago, this question of state versus federal supremacy has remained at the core of American politics. Indeed, the Civil War was fought, in part, over this question. That bloody conflict, however, settled only one part of the federalism question: the national government was supreme,

its sovereignty derived directly from the people, and thus the states could not lawfully secede from the Union. Virtually every other aspect of the national-supremacy issue has continued to be contested throughout time. As we will see below, the Courts generally have given the federal government more power over time, but they also have begun to place some important restrictions on federal power in recent years.

## The Supreme Court Speaks

As arbiter of what the Constitution means, the Supreme Court became the focal point of the debate over whether state or national power should reign supreme. In Chapter 12, we shall see in some detail how the Court made its decisions. For now it is enough to know that during the formative years of the new Republic, the Supreme Court was led by a staunch and brilliant advocate of Hamilton's position, Chief Justice John Marshall. In a series of decisions, he and the Court powerfully defended the national-supremacy view of the newly formed federal government.

The box on p. 43 lists some landmark cases in the history of federal-state relations. Perhaps the most important decision was in a seemingly trivial case which arose when James McCulloch, the cashier of the Baltimore branch of the Bank of the United States—which had been created by Congress—refused to pay a tax levied on that bank by the state of Maryland. He was hauled into state court and convicted of failing to pay the tax. In 1819, McCulloch appealed all the way to the Supreme Court in a case known as *McCulloch v. Maryland*. The Court, in a unanimous opinion, answered two questions in ways that expanded the powers of Congress and confirmed the supremacy of the federal government in the exercise of those powers.

The first question was whether Congress had the right to set up a bank, or any other corporation, since such a right is nowhere explicitly mentioned in the Constitution. Marshall said that, though the federal government possessed only those powers enumerated in the Constitution, the “extent”—that is, the meaning—of those powers required interpretation. Though the word *bank* is not in that document, one finds there the power to manage money: to lay and collect taxes, issue a currency, and borrow funds. To carry out these powers, Congress may reasonably decide that chartering a national bank is “necessary and proper.” Marshall's words were carefully chosen to endow the **“necessary and proper” clause** with the widest possible sweep:

*Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.*<sup>5</sup>

The second question was whether a federal bank could be taxed lawfully by a state. To answer it, Marshall went back to first principles. The government of the United States was not established by the states, but by the people, and thus the federal government was supreme in the exercise of

those powers conferred upon it. Having already concluded that chartering a bank was within the powers of Congress, Marshall then argued that the only way for such powers to be supreme was for their use to be immune from state challenge and for the products of their use to be protected against state destruction. Since “the power to tax involves the power to destroy,” and since the power to destroy a federal agency would confer upon the states supremacy over the federal government, the states may not tax any federal instrument. Hence the Maryland law was unconstitutional.

McCulloch won, and so did the federal government. Half a century later, the Court decided that what was sauce for the goose was sauce for the gander. It held that just as state governments could not tax federal bonds, the federal government could not tax the interest people earn on state and municipal bonds. In 1888, the Supreme Court reversed course and decided that Congress was now free, if it wished, to tax the interest on such state and local bonds.<sup>6</sup> Municipal bonds, which for nearly a century were a tax-exempt investment protected (so their holders thought) by the Constitution, were now protected only by politics. So far, Congress hasn't tried to tax them.

## Nullification

The Supreme Court can decide a case without settling the issue. The struggle over states' rights versus national supremacy continued to rage in Congress, during presidential elections, and ultimately on the battlefield. The issue came to center on the doctrine of **nullification**. When in 1798 Congress passed laws to punish newspaper editors who published stories critical of the federal government, James Madison and Thomas Jefferson opposed the laws, suggesting (in statements known as the Virginia and Kentucky Resolutions) that the states had the right to “nullify” (i.e., declare null and void) a federal law that, in the states' opinion, violated the Constitution. The laws expired before the claim of nullification could be settled in the courts.

Later, John C. Calhoun of South Carolina revived the doctrine of nullification, first in opposition to a tariff enacted by the federal government and later in opposition to federal efforts to restrict slavery. Calhoun argued that if Washington attempted to ban slavery, the states had the right to declare such acts unconstitutional and thus null and void. This time, the issue was settled—by war. The northern victory in the Civil War determined once and for all that the federal union is indissoluble and that states cannot declare acts of Congress unconstitutional, a view later confirmed by the Supreme Court.<sup>7</sup>

**“necessary and proper” clause**  
Section of the Constitution that allows Congress to pass all laws “necessary and proper” to its duties, and has permitted Congress to exercise powers not specifically given to it (enumerated) by the Constitution.

**nullification** The doctrine that a state can declare null and void a federal law that, in the state's opinion, violates the Constitution.

**dual federalism**

Doctrine holding that the national government is supreme in its sphere, the states are supreme in theirs, and the two spheres should be kept separate.

**cooperative**

**federalism** Idea that the federal and state governments share power in many policy areas.

## Dual to Cooperative Federalism

After the Civil War, the debate about the meaning of federalism focused on the interpretation of the commerce clause of the Constitution. Out of this debate emerged the doctrine of **dual federalism**, which held that though the national government was supreme in its sphere, the states were equally supreme in theirs, and that these two spheres of action should and could be kept separate. Applied to commerce, the concept of dual federalism

implied that there were such things as *interstate* commerce, which Congress could regulate, and *intrastate* commerce, which only the states could regulate, and that the Court could determine which was which.

For a long period the Court tried to decide what was interstate commerce based on the kind of business that was conducted. Transporting things between states was obviously interstate commerce, and so subject to federal regulation. Thus federal laws affecting the interstate shipment of lottery tickets,<sup>8</sup> prostitutes,<sup>9</sup> liquor,<sup>10</sup> and harmful foods and drugs<sup>11</sup> were upheld. On the other hand, manufacturing,<sup>12</sup> insurance,<sup>13</sup> and farming<sup>14</sup> were in the past considered *intra*-state commerce, and so only the state governments were allowed to regulate them.

Such product-based distinctions turned out to be hard to sustain. For example, if you ship a case of whiskey from Kentucky to Kansas, how long is it in interstate commerce (and thus subject to federal law), and when does it enter intrastate commerce and become subject only to state law? For a while, the Court's answer was that the whiskey was in interstate commerce so long as it was in its "original package,"<sup>15</sup> but that only precipitated long quarrels as to what was the original package and how one is to treat things, like gas and grain, which may not be shipped in packages at all.

And how could one distinguish between manufacturing and transportation when one company did both or when a single manufacturing corporation owned factories in different states? And if an insurance company sold policies to customers both inside and outside a given state, were there to be different laws regulating identical policies that happened to be purchased from the same company by persons in different states?

In time, the effort to find some clear principles that distinguished interstate from intrastate commerce was pretty much abandoned. Commerce was like a stream flowing through the country, drawing to itself contributions from thousands of scattered enterprises and depositing its products in millions of individual homes. The Court began to permit the federal government to regulate almost anything that affected this stream, so that by the 1940s not only had farming and manufacturing been redefined as part of interstate commerce,<sup>16</sup>

but even the janitors and window washers in buildings that housed companies engaged in interstate commerce were now said to be part of that stream.<sup>17</sup>

More generally, over time, the power of the federal government expanded and intruded on areas once thought solely to be the province of the states. Today, unlike in the 19th century, it is more difficult to define many areas of clearly national or state dominance. The example of interstate commerce discussed above is one, but other areas, such as school policy or highways, also illustrate the point. For example, at one time, highways were the responsibility of state governments, but with the establishment of the interstate highway system in the 1950s, the federal government took on a large role in transportation policy. Likewise, while education has long been considered primarily a state and local government concern, over time the federal government has become more involved through the Elementary and Secondary Education Act, the No Child Left Behind Act, and President Barack Obama's Race to the Top Initiative. Today, some speak of a program of **cooperative federalism**, where the national and state governments share responsibilities in most policy areas. If dual federalism is a layer cake where the state and federal governments have separate spheres of sovereignty (hence separate layers), cooperative federalism is a marble cake where the two blend together.

## State Sovereignty

It would be a mistake to think that the doctrine of dual federalism is entirely dead, however. Until recently Congress—provided that it had a good reason—could pass a law regulating almost any kind of economic activity anywhere in the country, and the Supreme Court would call it constitutional. But in *United States v. Lopez* (1995), the Court held that Congress had exceeded its commerce clause power by prohibiting guns in a school zone. This marked the first in a series of decisions in which the court began to reassert a greater role for state (as opposed to national) power.

The Court reaffirmed the view that the commerce clause does not justify any federal action when, in May 2000, it overturned part of the Violence Against Women Act of 1994. The portion of the law at issue allowed women who were the victims of a violent crime motivated by gender to sue the guilty party in federal court. In *United States v. Morrison*, the Court, in a five-to-four decision, said that attacks against women are not, and do not substantially affect, interstate commerce, and hence Congress cannot constitutionally pass such a law. Chief Justice William Rehnquist said that "the Constitution requires a distinction between what is truly national and what is truly local." The states, of course, can pass such laws, and many have.

The Court has moved to strengthen states' rights on other grounds as well. In *Printz v. United States* (1997), the Court invalidated a federal law that required local police to conduct background checks on all gun purchasers. The Court ruled that the law violated the Tenth Amendment by commanding state governments to carry out a federal regulatory program. Writing for the five-to-four majority, Justice Antonin Scalia declared, "The Federal government may neither issue directives requiring the states to address



particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a Federal regulatory program. ... Such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

The Court has also given new life to the Eleventh Amendment, which protects states from lawsuits by citizens of other states or foreign nations. In 1999, the Court shielded states from suits by copyright owners who claimed infringement of copyrights issued by state agencies, and immunized states from lawsuits by people who argued that state regulations create unfair economic competition. In *Alden v. Maine* (1999), the Court held that state employees could not sue to force state compliance with federal fair-labor laws. In the Court's five-to-four majority opinion, Justice Anthony M. Kennedy stated, "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the states in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the nation." A few years later, in *Federal Maritime Commission v. South Carolina Ports Authority* (2002), the Court further

expanded states' sovereign immunity from private lawsuits. Writing for the five-to-four majority, Justice Clarence Thomas declared that dual sovereignty "is a defining feature of our nation's constitutional blueprint," adding that the states "did not consent to become mere appendages of the federal government" when they ratified the Constitution.

Not all Court decisions, however, support greater state sovereignty. In *Saenz v. Roe* (1999), for example, the Court ruled seven to two that state welfare programs may not restrict new residents to the welfare benefits they would have received in the states from which they moved. Likewise, in *Gonzales v. Raich* (2005), the Court ruled that Congress may criminalize marijuana even in states where it is approved for medicinal purposes. Furthermore, in *Arizona v. United States* (2012), the Court held that only the federal government had the right to regulate immigration laws and enforcement. More generally, to empower states is not to disempower Congress, which—as it has done since the late 1930s—can still make federal laws regarding almost anything as long as it does not go too far in "commandeering" state resources or gutting states' rights.



## LANDMARK CASES

### Federal–State Relations

- **McCulloch v. Maryland (1819):** The Constitution's "necessary and proper" clause permits Congress to take actions (in this case, to create a national bank) when it is essential to a power that Congress has (in this case, managing the currency).
- **Gibbons v. Ogden (1824):** The Constitution's commerce clause gives the national government exclusive power to regulate interstate commerce.
- **Wabash, St. Louis and Pacific Railroad v. Illinois (1886):** The states may not regulate interstate commerce.
- **United States v. Lopez (1995):** The national government's power under the commerce clause does not permit it to regulate matters not directly related to interstate commerce (in this case, banning firearms in a school zone).
- **Printz v. United States (1997):** The national government's authority to require state officials to administer or enforce a federal regulation is limited.
- **Alden v. Maine (1999):** Congress may not act to subject nonconsenting states to lawsuits in state courts.
- **Reno v. Condon (2000):** The national government's authority to regulate interstate commerce extends to restrictions on how states gather, circulate, or sell certain information about citizens.
- **U.S. v. Morrison (2000):** The national government's power to regulate interstate commerce does not extend to giving female victims of violence the right to sue perpetrators in federal court.
- **Federal Maritime Commission v. South Carolina Ports Authority (2002):** The Court expanded states' sovereign immunity from private lawsuits and declared that the states "did not consent to become mere appendages of the federal government" when they ratified the Constitution.
- **Kelo v. City of New London (2005):** The Constitution allows a local government to seize property, not only for "public use" such as building highways, but also to "promote economic development" in a "distressed" community.
- **National Federation of Independent Business v. Sebelius (2010):** The national government's authority to "alter" or "amend" programs that it jointly funds and administers with the states is limited.
- **Arizona v. United States (2012):** Only the federal government may regulate immigration laws and enforcement.
- **King v. Burwell (2015):** Individuals using both the state-run and federally run health insurance exchanges may receive health insurance subsidies from the federal government.
- **Obergefell v. Hodges (2015):** There is a constitutional right to same-sex marriage in the United States.

The Court's recent ruling on gay marriage offers another illustration of federal law trumping state ones. Traditionally, marriage has been a state matter, not a federal one. As gays and lesbians began to push for greater equality, including the right to marry (see Chapter 5), many states responded by banning same-sex marriage. In *Obergefell v. Hodges* (2015), the Court ruled that such bans were unconstitutional, and established a right to marriage for gay and lesbian couples under the Constitution. While marriage laws are generally a state matter, such laws cannot contravene the Constitution.

This ongoing debate about state versus national sovereignty calls to mind President Wilson's quote from earlier in the chapter: Federalism really is at the heart of American politics, and cannot be resolved definitively, but rather is recontested again and again. Over time, the spheres of activity of the state and national governments have shifted, and will continue to do so moving forward.

Finally, we would note that it is not just the Court that shapes federalism. As we discuss in later chapters, American national institutions have become more characterized by gridlock and the inability to produce new policies in recent years. In response, many interest groups and activists have turned to state houses to press their agendas. As a result, policy debates that once raged in the halls of Congress—on issues such as abortion, gun control, environmental protection, and so forth—are now largely fought at the state level.<sup>18</sup> This ensures that federalism will remain a relevant topic in the years to come.

## 3-2 Governmental Structure

Federalism refers to a political system in which there are local units of government (territorial, regional, provincial, state, or municipal), as well as a national government, that can make final decisions for at least some governmental activities and whose existence is specially protected. Almost every nation in the world has local units of government of some kind, if for no other reason than to decentralize the administrative burdens of governing. But these governments are not federal unless the local units exist independently of the preferences of the national government and can make decisions on at least some matters without regard to those preferences.

The United States, Canada, Australia, India, Germany, and Switzerland are federal systems, as are a few other nations. France, Great Britain, Italy, and Sweden are not; they are unitary systems because such local governments as they possess can be altered or even abolished by the national government and cannot plausibly claim final authority over any significant governmental activities.

The special protection that subnational governments enjoy in a federal system derives in part from the constitution of the country, but also from the habits, preferences, and dispositions of the citizens and the actual distribution of political power in society. In theory, the constitution of the former Soviet Union created a federal system, as claimed by that country's full name—the Union of Soviet Socialist Republics—but for most of their history, none of these “socialist republics” were in the slightest degree independent of the central government. Were the American Constitution the only guarantee of the independence of the American

states, they would long since have become mere administrative subunits of the government in Washington. Their independence results in large measure from the commitment of Americans to the idea of local self-government and from the fact that Congress consists of people who are selected by and responsive to local constituencies.

“The basic political fact of federalism,” writes David B. Truman, “is that it creates separate, self-sustaining centers of power, prestige, and profit.”<sup>19</sup> Political power is acquired locally by people whose careers depend, for the most part, on satisfying local interests. As a result, while the national government has come to have vast powers, it exercises many of those powers through state governments.

What many of us forget when we think about “the government in Washington” is that it spends much of its money and enforces most of its rules not directly on citizens, but on other, local units of government. A large part of the welfare system, all of the interstate highway system, virtually every aspect of programs to improve cities, the largest part of the effort to supply jobs to the unemployed, the entire program to clean up our water, and even much of our military manpower (in the form of the National Guard) are enterprises in which the national government does not govern so much as it seeks—by regulation, grant, plan, argument, and cajolery—to get the states to govern in accordance with nationally (though often vaguely) defined goals.

In France, welfare, highways, education, the police, and the use of land are all matters that are directed nationally. In the United States, highways and some welfare programs are largely state functions (though they make use of federal money), while education, policing, and land-use controls are primarily local (city, county, or special-district) functions.

Sometimes, however, confusion or controversy about which government is responsible for which functions surfaces at the worst possible moment and lingers long after attempts have been made to sort it all out. Sadly, in our day, that is largely what “federalism” has meant in practice to citizens from New Orleans and the Gulf Coast region impacted by Hurricane Katrina in 2005.

Before, during, and after Hurricanes Katrina and Rita struck in 2005, federal, state, and local officials could be found fighting among themselves over everything from who was supposed to maintain and repair the levees to who should lead disaster-relief initiatives. In the weeks after the hurricanes hit, it was reported widely that the main first-responders and disaster-relief workers came not from government, but from myriad religious and other charitable organizations. Not only that, but government agencies such as the Federal Emergency Management Agency (FEMA) often acted in ways that made it harder, not easier, for these volunteers and groups to deliver help when and where it was most badly needed.

Federalism needs to be viewed dispassionately through a historical lens wide enough to encompass both its worst legacies (for instance, state and local laws that once legalized racial discrimination against African Americans) and its best (for instance, African Americans winning mayors' offices and seats in state legislatures when there were very few African Americans in Congress).

Federalism, it is fair to say, has the virtues of its vices and the vices of its virtues. To some, federalism means allowing states to block action, prevent progress, upset national plans, protect powerful local interests, and cater to the self-interest of hack politicians. Harold Laski, a British observer, described American states as “parasitic and poisonous,”<sup>20</sup> and William H. Riker, an American political scientist, argued that “the main effect of federalism since the Civil War has been to perpetuate racism.”<sup>21</sup> By contrast, another political scientist, Daniel J. Elazar, argued that the “virtue of the federal system lies in its ability to develop and maintain mechanisms vital to the perpetuation of the unique combination of governmental strength, political flexibility, and individual liberty, which has been the central concern of American politics.”<sup>22</sup>

So diametrically opposed are the Riker and Elazar views that one wonders whether they are talking about the same subject. They are, of course, but they are stressing different aspects of the same phenomenon. Whenever the opportunity to exercise political power is widely available (as among the 50 states, 3,000 counties, and many thousands of municipalities in the United States), it is obvious that in different places different people will make use of that power for different purposes. There is no question that allowing states and cities to make autonomous, binding political decisions will allow some people in some places to make those decisions in ways that maintain racial segregation, protect vested interests, and facilitate corruption. It is equally true, however, that this arrangement also enables other people in other places to pass laws that attack segregation, regulate harmful economic practices, and purify politics, often long before these ideas gain national support or become national policy.

The existence of independent state and local governments means that different political groups pursuing different political purposes will come to power in different places. The smaller the political unit, the more likely it is to be dominated by a single political faction. James Madison understood this fact perfectly and used it to argue (in *Federalist* No. 10) that it would be in a large or “extended” republic, such as the United States as a whole, that one would find the greatest opportunity for all relevant interests to be heard. When William Riker condemns federalism, he is thinking that in some places the ruling factions in cities and states have opposed granting equal rights to African Americans. When Daniel Elazar praises federalism, he is recalling that in other states and cities, the ruling factions have taken the lead (long in advance of the federal government) in developing measures to protect the environment, extend civil rights, and improve social conditions. If you live in California, whether you like federalism depends in part on whether you like that California has, independently of the federal government, cut property taxes, controlled coastal land use strictly, regulated electric utilities heavily, and at various times increased or decreased its welfare rolls.

## Increased Political Activity

Federalism has many effects, but its most obvious has been to facilitate the mobilization of political activity. Unlike Don Quixote, the average citizen does not tilt at windmills. He



## HOW WE COMPARE

### American-Style Federalism

The United States has always had a federal form of government. By contrast, most of the nearly 200 nations in existence today have never had a federal form of government. Depending on the stringency of the criteria used to delineate federal from unitary systems, the United States is one of roughly two dozen nations that now have federal forms of government. America, Australia, Belgium, Brazil, Canada, Ethiopia, Germany, India, Malaysia, Mexico, Nigeria, Pakistan, Russia, South Africa, Spain, and Switzerland are on nearly every expert's list of federal nations.

But some of these nations (such as Belgium, Spain, and South Africa) once had unitary systems, and many nations that have federal forms of government are multiparty parliamentary democracies. By contrast, American-style federalism has shaped and been shaped by the country's separation-of-powers system (see Chapter 2) and its two-party electoral system (see Chapter 7).

In some federal nations, public opinion favors the national government over subnational governments: People in these countries tend to trust their national governments as much or more than they trust other levels of government. In contrast, Americans tend to trust their state and local governments more than they trust Washington.

**Sources:** “Trust in Government Remains Low,” Gallup Organization, September 2008; Richard Cole and John Kincaid, “Public Opinion on U.S. Federal and Intergovernmental Issues,” *Publius: The Journal of Federalism* 36 (Summer 2006): 443–459; John Kincaid and G. Alan Tarr, eds., *Constitutional Origins, Structure, and Change in Federal Countries* (Montreal: McGill-Queens Press, 2005); Pradeep Chhibber and Ken Kollman, *The Formation of National Party Systems: Federalism and Party Competition in Canada, Great Britain, India, and the United States* (Princeton, N.J.: Princeton University Press, 2004).

or she is more likely to become involved in organized political activity if he or she feels a reasonable chance exists of producing a practical effect. The chances of having such an effect are greater where there are many elected officials and independent governmental bodies, each with a relatively small constituency, than where there are few elected officials, most of whom have the nation as a whole for a constituency. In short, a federal system lowers the cost of organized political activity, due to the decentralization of authority; a unitary system raises the cost, due to the centralization of authority. We may disagree about the purposes of organized political activity, but the fact of widespread organized activity can scarcely be doubted—or if you do doubt it, that is only because you have not yet read Chapters 7 and 8.

It is impossible to say whether the Founders, when they wrote the Constitution, planned to produce such widespread opportunities for political participation. Unfortunately, they were



**laboratories of democracy** Idea that different states can implement different policies, and the successful ones will spread.

**initiative** Process that permits voters to put legislative measures directly on the ballot.

**referendum** Procedure enabling voters to reject a measure passed by the legislature.

**recall** Procedure whereby voters can remove an elected official from office.

not very clear (at least in writing) about how the federal system was supposed to work. Thus, most of the interesting questions about the jurisdiction and powers of our national and state governments had to be settled by a century and a half of protracted and often bitter conflict.

## Different States, Different Policies

The states play a key role in many policy areas, such as social welfare, public education, law enforcement, criminal justice, health care and hospitals, roads and highways, and managing water supplies. On these and many other matters, state constitutions and laws are far more detailed and sometimes confer more rights than the federal one. For example, the California constitution

includes an explicit right to privacy, says that noncitizens have the same property rights as citizens, and requires the state to use “all suitable means” to support public education.

This diversity is a benefit of federalism: that different states can construct different policies that better fit with their local needs. This is the classic idea of “**laboratories of democracy**”: States can try out different policies, and if they are successful, others can copy them.<sup>23</sup> This is indeed a benefit of federalism: Many successful policies are first adopted in one place (such as health care reforms, welfare reforms, and so forth), and then copied in other states (or even in the federal government) when they prove to be successful.<sup>24</sup>

But this sort of experimentation generates a cost as well. Because different states have different policies, citizens will be treated differently depending on their state of residence. For example, as we explained in the Constitutional Connections feature, part of Obamacare called for states to expand Medicare to provide health insurance to the working poor. Some states have chosen to expand Medicaid under Obamacare (such as California, North Dakota, and West Virginia), while others have not (such as Texas, Oklahoma, and Florida). So low-income Americans would qualify for Medicaid benefits in some states, but not others. Likewise, in some states, those convicted of crimes are subject to the death penalty, but not in others. The benefit of policy differences means that we pay a price in terms of equality.

More generally, this variation in federalism highlights the two competing values at stake here: equality and participation. On the one hand, by allowing states to design different policies for health care, education, criminal justice, and more, federalism means that citizens in different jurisdictions will be treated differently—and hence pay a cost in terms of equality. But at the same time, federalism allows for participatory input: for more say in how schools are governed, where roads are built, how criminal justice policies are set, and so forth. Indeed, the differences in policy discussed above are largely a function of the differences in participation. So we cannot have more equality without having less participation, and vice versa. Having the benefit of “laboratories of democracy” means that not all citizens will be treated equally.

Why do these various policies differ so much across states? The most fundamental answer is that participation is different: Different people, with different preferences, participate in the decision-making process in different states. But they can also differ because different states have different institutions as well, especially in terms of direct democracy. As we saw in Chapter 2, the federal Constitution is based on a republican, not a democratic, principle: Laws are to be made by the representatives of citizens, not by the citizens directly. But many state constitutions open one or more of three doors to direct democracy.

About half of the states provide for some form of legislation by initiative. The **initiative** allows voters to place legislative measures, and sometimes constitutional amendments, directly on the ballot by getting enough signatures (usually between 5 and 15 percent of those who voted in the last election) on a petition. About half of the states permit the **referendum**, a procedure that enables voters to reject a measure adopted by the legislature. Sometimes the state constitution specifies that certain kinds of legislation (e.g., tax increases) must be subject to a referendum whether the legislature wishes it or not. The **recall** is a procedure, in



Stock Montage/Getty Images

**IMAGE 3-2** Federalism has permitted experimentation. Women were able to vote in the Wyoming Territory in 1888, long before they could do so in most states.



effect in more than 20 states, whereby voters can remove an elected official from office. If enough signatures are gathered on a petition, the official must go before voters, who can vote to leave the person in office, remove the person from office, or remove the person and replace him or her with someone else. In 2003, California voters recalled then-governor Gray Davis and replaced him with Arnold Schwarzenegger; in 2012, Wisconsin governor Scott Walker faced a recall election, but survived and remained in office.

The existence of the states is guaranteed by the federal Constitution: no state can be divided without its consent, each state must have two representatives in the Senate (the only provision of the Constitution that may not be amended), every state is assured of a republican form of government, and the powers not granted to Congress are reserved for the states. By contrast, cities, towns, and counties enjoy no such protection; they exist at the pleasure of the states. Indeed, states frequently have abolished certain kinds of local governments, such as independent school districts.

This explains why there is no debate about city sovereignty comparable to the debate about state sovereignty. The constitutional division of power between them is settled: The state is supreme. But federal–state relations can be complicated because the Constitution invites elected leaders to struggle over sovereignty. Which level of government has the ultimate power to decide where nuclear waste gets stored, how much welfare beneficiaries are paid, what rights prisoners enjoy, or whether supersonic jets can land at local airports? American federalism answers such questions, but on a case-by-case basis through intergovernmental politics and court decisions.

### 3-3 Federal Money, State Programs

As we discussed above, over time we have gone to a system where both the national and state governments contribute to most policy areas. One key way this occurs is via various federal grant programs, where the federal government provides the money—and accompanying rules—for programs implemented at the state level. To understand contemporary federalism, we need to understand how national monies help to shape policy at all levels of government.

#### Grants-In-Aid

Perhaps the oldest example of national funds being used at the state level is federal **grants-in-aid**. The first of these programs began even before the Constitution was adopted, in the form of land grants made by the national government to the states in order to finance education. (State universities all over the country were built with the proceeds from the sale of these land grants; hence the name *land-grant colleges*.) Land grants were also made to support the building of wagon roads, canals, railroads, and flood-control projects. These measures were debated hotly in Congress—President Madison thought some were unconstitutional—even though the use for the land grants was left almost entirely to the states.

Cash grants-in-aid began almost as early. In 1808, Congress gave \$200,000 to the states to pay for their militias, with the states in charge of the size, deployment, and command of these troops. However, grant-in-aid programs remained few in number and small in price until the 20th century, when scores of new ones came into being. Today, federal grants go to hundreds of programs, including such giant federal–state programs as Medicaid (see Table 3-1). Overall, in fiscal year 2014 (the most recent data available), the federal government spent \$577 billion on federal grants-in-aid, representing 16.5 percent of federal outlays in that year.<sup>25</sup>

The grants-in-aid system, once under way, grew rapidly because it helped state and local officials resolve a dilemma. On the one hand, they wanted access to the superior taxing power of the federal government. On the other hand, prevailing constitutional interpretation, at least until the late 1930s, held that the federal government could not spend money for purposes not authorized by the Constitution. The solution was obviously to have federal money put into state hands. Washington would pay the bills; the states would run the programs.

To state officials, federal money seemed so attractive for several reasons. First, the money was there. Thanks to the high-tariff policies of the Republicans, Washington in the 1880s had huge budget surpluses. Second, in the 1920s, as those surpluses dwindled Washington inaugurated the federal income tax. It automatically brought in more money as economic activity, and thus personal income, grew. Third, the federal government, unlike the states, managed the currency and could print more at will. (Technically, it borrowed this money, but it was under no obligation to pay it all back because, as a practical matter, it had borrowed from itself.) States could not do this; if they borrowed money (and many could not), they had to pay it back, in full.

These three economic reasons for the appeal of federal grants were probably not as important as a fourth reason: politics. Federal money seemed to a state official to be “free” money. Governors did not have to propose, collect,

**grants-in-aid** Money given by the national government to the states.

**TABLE 3-1** Federal Grants to State and Local Governments (2014)

**The federal government spent more than \$577 billion on grants to states in 2014.**

**Among the biggest items:**

Health care (including Medicaid)	\$320 billion
Income security	\$100.9 billion
Transportation	\$62.3 billion
Education, training, employment, and social services	\$60.5 billion
Community and regional development	\$13.2 billion

**Source:** Office of Management and Budget, FY2016 Budget, Table 15-1, “Trends in Federal Grants to State and Local Governments,” p. 267.

or take responsibility for federal taxes. Instead, a governor could denounce the federal government for being profligate in its use of the people's money. Meanwhile, he or she could claim credit for a new public works or other project funded by Washington and, until recent decades, expect little or no federal supervision in the bargain.<sup>26</sup>

That every state had an incentive to ask for federal money to pay for local programs meant, of course, that it would be very difficult for one state to get money for a given program without every state getting it. The senator from Alabama who votes for the project to improve navigation on the Tombigbee will have to vote in favor of projects improving navigation on every other river in the country if the senator expects his or her Senate colleagues to support such a request. Federalism as practiced in the United States means that when Washington wants to send money to one state or congressional district, it must send money to many states and districts.

Shortly after September 11, 2001, for example, President George W. Bush and congressional leaders in both parties pledged new federal funds to increase public safety payrolls, purchase the latest equipment to detect bioterror attacks, and so on. Since then, New York City and other big cities have received tens of millions of federal dollars for such purposes, but so have scores of smaller cities and towns. The grants allocated by the Department of Homeland Security were based on so-called fair-share formulas mandated by Congress, which are basically the same formulas the federal government uses to allocate certain highway and other funds among the states. These funding formulas not only spread money around but also generally skew funding toward states and cities with low populations. Thus, Wyoming received seven times as much federal homeland security funding per capita as New York State did, and Grand Forks County, North Dakota (population 70,000), received \$1.5 million to purchase biochemical suits, a semi-armored van, decontamination tents, and other equipment to deal with weapons of mass destruction.<sup>27</sup>

Grand Forks County was not the only recipient of such programs: thousands of state and local police departments were. For example, the St. Louis Area Regional Response

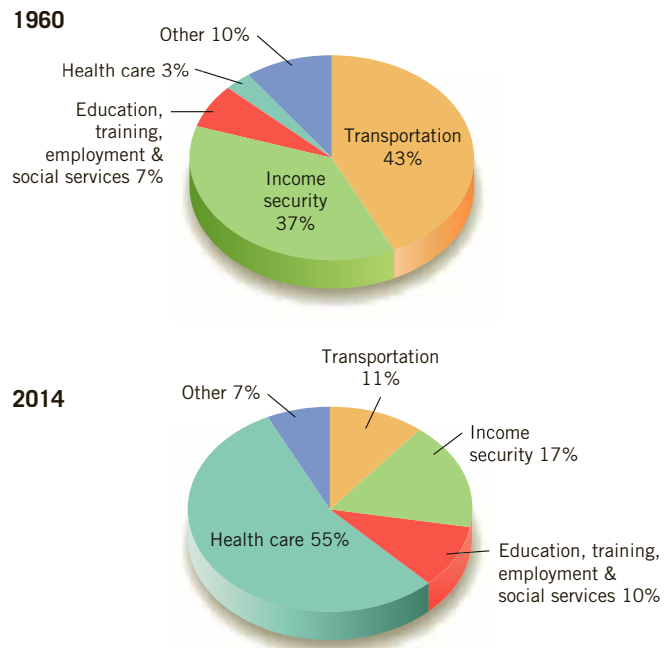
System (which administers these grants for the St. Louis area) has spent \$9.4 million on equipment for area police departments since 2003, including a Bearcat armored truck, two helicopters, night-vision goggles, and body armor. Such equipment was used in the clashes between police and protesters in 2014 following the death of Michael Brown in Ferguson, Missouri (a suburb of St. Louis).<sup>28</sup> In the wake of Brown's death, such programs were put under the spotlight with calls for tighter regulation on the provision of military-grade equipment to local police forces. The White House did impose some limits, but stopped short of cutting off such grant programs altogether.<sup>29</sup>

## Meeting National Needs

Until the 1960s, most federal grants-in-aid were conceived by or in cooperation with the states and were designed to serve essentially state purposes. Large blocs of voters and a variety of organized interests would press for grants to help farmers, build highways, or support vocational education. During the 1960s, however, an important change occurred: the federal government began devising grant programs based less on what states were demanding and more on what federal officials perceived to be important *national* needs (see Figure 3-2). Federal officials, not state and local ones, were the principal proponents of grant programs to aid the urban poor, combat crime, reduce pollution, and deal with drug abuse.

The rise in federal activism in setting goals, and the occasional efforts to bypass state officials by providing money directly to cities or even local citizen groups, had at

**FIGURE 3-2** The Changing Purpose of Federal Grants to State and Local Governments, 1960–2014



**Source:** Office of Management and Budget, FY2016 Budget, Table 15-1, "Trends in Federal Grants to State and Local Governments," p. 267.



**IMAGE 3-3** Police armed with military gear clashed with protesters following the death of Michael Brown in 2014. The military gear was provided to police departments by federal grants.

least two separate but related effects: one was to increase federal grants to state and local governments, and the other was to change the purposes to which those monies were put. Whereas federal aid amounted to less than 2 percent of state general revenue in 1927, by 2013 federal aid accounted for about one-third of state general revenue.<sup>30</sup> In 1960, about 3 percent of federal grants to state and local governments were for health care. Today, however, one federal-state health care program alone—Medicaid—accounts for nearly half of all federal grants (and overall grants for health care account for 55 percent of federal grants to states). And whereas in 1960 more than 40 percent of all federal grants to state and local governments went to transportation, including highways, today only about 10 percent is used for that purpose (see Figure 3-2).

These trends have important consequences for how we think about the size of government. While the overall level of federal spending has skyrocketed (increasing about five times in real dollars since 1960), the size of the federal workforce has stayed roughly constant over the past 60 years. Meanwhile, the state and local workforce has tripled over that same time span.<sup>31</sup> When we think of “big government,” it is largely big federal money implemented by a big state and local government workforce. That makes understanding these sorts of federal grants all the more important.

## The Intergovernmental Lobby

State and local officials, both elected and appointed, began to form an important new lobby—the “intergovernmental lobby,” made up of mayors, governors, superintendents of schools, state directors of public health, county highway commissioners, local police chiefs, and others who had come to depend on federal funds.<sup>32</sup> Today, federal agencies responsible for health care, criminal justice, environmental protection, and other programs have people on staff who specialize in providing information, technical assistance, and financial support to state and local organizations, including the “Big 7”: the U.S. Conference of Mayors; the National Governors Association; the National Association of Counties; the National League of Cities; the Council of State Governments; the International City/County Management Association; and the National Conference of State Legislatures. Reports by these groups and publications like *Governing* magazine are read routinely by many federal officials to keep a handle on issues and trends in state and local government.

National organizations of governors or mayors press for more federal money, but not for increased funding for any particular city or state. Thus most states, dozens of counties, and more than a hundred cities have their own offices in Washington, D.C. These groups also spend big on lobbying the federal government. According to the Center for Responsive Politics, in 2014 territory, state, and local governments collectively spent \$71 million lobbying Congress, with Los Angeles County alone spending almost \$1 million (and many other states and localities spending nearly as much).<sup>33</sup> Back home, state and local governments have created new positions, or redefined old ones, in response to new or changed federal funding opportunities.

The purpose of the intergovernmental lobby has been the same as that of any private lobby—to obtain more federal money with fewer strings attached. For a while, the cities and states did in fact get more money, but since the early 1980s their success in obtaining federal grants has been more checkered, though this has not stopped their lobbying efforts.

**categorical grants**  
Federal grants for specific purposes, such as building an airport.

## Categorical Grants

The effort to loosen the strings took the form of shifting, as much as possible, the federal aid from **categorical grants** to block grants. A categorical grant is one for a specific purpose defined by federal law: to build an airport or a college dormitory, for example, or to make welfare payments to low-income mothers. Such grants usually require that the state or locality put up money to “match” some part of the federal grant, though the amount of matching funds can be quite small (sometimes only 10 percent or less). Governors and mayors complained about these categorical grants, because their purposes were often so narrow that it was impossible for a state to adapt federal grants to local needs. A mayor seeking federal money to build parks might have discovered that the city could get money only if it launched an urban-renewal program that entailed bulldozing several blocks of housing or small businesses.

One response to this problem was to consolidate several categorical or project grant programs into a single block grant devoted to some general purpose, and with fewer restrictions on its use. Block grants began in the mid-1960s, when such a grant was created to fund health care programs. Though many block grants were proposed between 1966 and 1980, only five were enacted. Of the three largest, one consolidated various categorical grant programs aimed at cities (Community Development Block Grants), another created a program to aid local law enforcement (Law Enforcement Assistance Act), and a third authorized new kinds of locally managed programs for the unemployed (CETA, or the Comprehensive Employment and Training Act).

In theory, block grants and revenue sharing were supposed to give the states and cities considerable freedom in deciding how to spend the money while helping to relieve their tax burdens. To some extent they did. However, for four reasons, neither the goal of “no strings” nor that of fiscal relief was really attained.

First, the amount of money available from block grants and revenue sharing did not grow as fast as the states had hoped nor as quickly as did the money available through categorical grants.

Second, the federal government steadily increased the number of strings attached to the spending of this supposedly “unrestricted” money.

Third, block grants grew more slowly than categorical grants because of the different kinds of political coalitions supporting each. Congress and the federal bureaucracy liked categorical grants for the same reason the states disliked them—the specificity of these programs enhanced federal control over how the money was to be used. Federal officials,



joined by liberal interest groups and organized labor, tended to distrust state governments. Whenever Congress wanted to address some national problem, its natural inclination was to create a categorical grant program so that it, and not the states, would decide how the money would be spent.

Fourth, even though governors and mayors like block grants, these programs cover such a broad range of activities that no single interest group has a vital stake in pressing for their enlargement. Categorical grants, on the other hand, often are a matter of life and death for many agencies—state departments of welfare, of highways, and of health, for example, are utterly dependent on federal aid. Accordingly, the administrators in charge of these programs will press strenuously for their expansion. Moreover, categorical programs are supervised by special committees of Congress, and as we shall see in Chapter 9, many of these committees have an interest in seeing their programs grow.

### Rivalry Among the States

The more important federal money becomes to the states, the more likely the states are to compete among themselves for the largest share of it. For a century or better, the growth of the United States in population, business, and income was concentrated in the industrial Northeast. In recent decades, however, that growth—at least in population and employment, if not in income—has shifted to the South, Southwest, and Far West. This change has precipitated an intense debate over whether the federal government, by the way it distributes its funds and awards its contracts, is unfairly helping some regions and states at the expense of others. Journalists and politicians have dubbed the struggle as one between Snowbelt (or Frostbelt) and Sunbelt states.

Whether in fact there is anything worth arguing about is far from clear: The federal government has had great difficulty in figuring out where it ultimately spends what funds for what purposes. For example, a \$1 billion defense contract may go to a company with headquarters in California, but much of the money may actually be spent in Connecticut or New York, as the prime contractor in California buys from sub-contractors in the other states. It is even less clear whether federal funds actually affect the growth rate of the regions. The uncertainty about the facts has not prevented a debate about the issue, however. That debate focuses on the formulas written into federal laws by which block grants are allocated. These formulas take into account such factors as a county's or city's population, personal income in the area, and housing quality. A slight change in a formula can shift millions of dollars in grants in ways that favor either the older, declining cities of the Northeast or the newer, still-growing cities of the Southwest.

With the advent of grants based on distributional formulas (as opposed to grants for a particular project), the results of the census, taken every 10 years, assume monumental importance. A city or state shown to be losing population may, as a result, forfeit millions of dollars in federal aid. Senators and representatives now have access to computers that can tell them instantly the effect on their states and districts of even minor changes in a formula by which federal aid is distributed. These formulas rely on objective measures, but the exact measure is selected with an eye to its political consequences. There is nothing wrong with this in principle, since any political system must provide some benefits for everybody if it is to stay together. Given the competition among states in a federal system, however, the struggle over allocation formulas becomes especially acute.



JEWEL SAMADI/AFP/Getty Images

**IMAGE 3-4** New Jersey Governor Chris Christie greets President Barack Obama, who visits the state to see the devastation caused by superstorm Sandy in October 2012.



## Federal Aid and Federal Control

So important has federal aid become for state and local governments that mayors and governors, along with others, began to fear that Washington was well on its way to controlling other levels of government. “He who pays the piper calls the tune,” they muttered. In this view, the constitutional protection of state government to be found in the Tenth Amendment was in jeopardy as a result of the strings attached to the grants-in-aid on which the states were increasingly dependent.

Block grants were an effort to reverse this trend by allowing the states and localities freedom to spend money as they wished. But as we have seen, the new device did not in fact reverse the trend. Categorical grants—those with strings attached—continued to grow even faster.

There are two kinds of federal controls on state governmental activities. The traditional control tells the state government what it must do if it wants to get some grant money. These strings often are called **conditions of aid**. The newer form of control tells the state government what it must do, period. These rules are called **mandates**. Most mandates have little or nothing to do with federal aid—they apply to all state governments whether or not they accept grants.

### Mandates

Most mandates concern civil rights and environmental protection. States may not discriminate in the operation of their programs, no matter who pays for them. Initially the anti-discrimination rules applied chiefly to distinctions based on race, sex, age, and ethnicity, but of late they have broadened to include physical and mental disabilities as well. Various pollution control laws require the states to comply with federal standards for clean air, pure drinking water, and sewage treatment.<sup>34</sup>

Stated in general terms, these mandates seem reasonable enough. It is hard to imagine anyone arguing that state governments should be free to discriminate against people because of their race or national origin. In practice, however, some mandates create administrative and financial problems—especially when the mandates are written in vague language, thereby giving federal administrative agencies the power to decide for themselves what state and local governments are supposed to do.

But not all areas of public law and policy are equally affected by mandates. Federal–state disputes about who governs on such controversial matters as minors’ access to abortion, same-sex marriage, and medical uses for banned narcotics make headlines. Mandates fuel everyday friction in federal–state relations, particularly those levied by Washington but paid for by the states. One study concluded that “the number of unfunded federal mandates is high in environmental policy, low in education policy, and moderate in health policy.”<sup>35</sup> But why?

Some think that how much Washington spends in a given policy area is linked to how common federal mandates, funded or not, are in that same area. There is some evidence for that view. For instance, in recent years, annual

federal grants to state and local governments for environmental protection—a policy area where unfunded mandates are pervasive—were about \$4 billion; yet federal grants for health care—an area where unfunded mandates have been less pervasive—amounted to about \$200 billion. The implication is that when Washington itself spends less on something it wants done, it squeezes the states to spend more for that purpose.

Washington is more likely to grant state and local governments waivers in some areas than in others. A **waiver** is a decision by an administrative agency granting some other party permission to violate a law or administrative rule that would otherwise apply to it. Generally, for instance, education waivers have been easy for state and local governments to get, but environmental protection waivers have proven almost impossible to acquire.<sup>36</sup>

However, caution is in order. Often, the more one knows about federal–state relations in any given area, the harder it becomes to generalize about present-day federalism’s fiscal, administrative, and regulatory character, the conditions under which “permissive federalism” prevails, or whether new laws or court decisions will considerably tighten or further loosen Washington’s control over the states.

Mandates are not the only way in which the federal government imposes costs on state and local governments. Certain federal tax and regulatory policies make it difficult or expensive for state and local governments to raise revenues, borrow funds, or privatize public functions. Other federal laws expose state and local governments to financial liability. Numerous federal court decisions and administrative regulations require or prohibit various actions by state and local governments, either by statute or through an implied constitutional obligation.<sup>37</sup>

It is clear that the federal courts have helped fuel the growth of mandates. As interpreted by the U.S. Supreme Court, the Tenth Amendment provides state and local officials no protection against the march of mandates. Indeed, many of the more controversial mandates result not from congressional action but from court decisions. For example, many state prison systems have been, at one time or another, under the control of federal judges who required major changes in prison construction and management in order to meet standards the judges derived from their reading of the Constitution.

The Supreme Court has made it much easier of late for citizens to control the behavior of local officials. A federal law, passed in the 1870s to protect newly freed slaves, makes it possible for a citizen to sue any state or local official who

#### **conditions of aid**

Terms set by the national government that states must meet if they are to receive certain federal funds.

**mandates** Terms set by the national government that states must meet whether or not they accept federal grants.

**waiver** A decision by an administrative agency granting some other party permission to violate a law or rule that would otherwise apply to it.

**devolution** The transfer of power from the national government to state and local governments.

deprives that citizen of any “rights, privileges, or immunities secured by the Constitution and laws” of the United States. A century later, the Court decided that this law permitted a citizen to sue a local official if

the official deprived the citizen of *anything* to which the citizen was entitled under federal law (and not just those federal laws protecting civil rights). For example, a citizen can now use the federal courts to obtain from a state welfare office a payment to which he or she may be entitled under federal law.

### Conditions of Aid

By far the most important federal restrictions on state action are the conditions attached to the grants the states receive. In theory, accepting these conditions is voluntary—if you don’t want the strings, don’t take the money. But when the typical state depends for a quarter or more of its budget on federal grants, many of which it has received for years and on which many of its citizens depend for their livelihoods, it is not clear exactly how “voluntary” such acceptance is. During the 1960s, some strings were added, the most important of which had to do with civil rights. But beginning in the 1970s, the number of conditions began to proliferate and has expanded in each subsequent decade.

Some conditions are specific to particular programs, but most are not. For instance, if a state builds something with federal money, it must first conduct an environmental impact study, it must pay construction workers the “prevailing wage” in the area, it often must provide an opportunity for citizen participation in some aspects of the design or location of the project, and it must ensure that the contractors who build the project have nondiscriminatory hiring policies. The states and the federal government, not surprisingly, disagree about the costs and benefits of such rules. Members of Congress and federal officials feel they have an obligation to develop uniform national policies with respect to important matters and to prevent states and cities from mispending federal tax dollars. State officials, on the other hand, feel these national rules fail to take into account diverse local conditions, require the states to do things that the states must then pay for, and create serious inefficiencies.

What state and local officials discovered, in short, was that “free” federal money was not quite free after all. In the 1960s, federal aid seemed entirely beneficial; what mayor or governor would not want such money? But just as local officials found it attractive to do things that another level of government then paid for, in time federal officials learned the same thing. Passing laws to meet the concerns of national constituencies—leaving the cities and states to pay the bills and manage the problems—began to seem attractive to Congress.

Because they face different demands, federal and local officials find themselves in a bargaining situation in which each side is trying to get some benefit (solving a problem, satisfying a pressure group) while passing on to the other side most of the costs (taxes, administrative problems). The bargains struck in this process used to favor the local officials,

because members of Congress were essentially servants of local interests: they were elected by local political parties, they were part of local political organizations, and they supported local autonomy. Beginning in the 1960s, however, changes in American politics that will be described in later chapters shifted the orientation of many in Congress toward favoring Washington’s needs over local needs.

## 3-4 A Devolution Revolution?

In 1981, President Ronald Reagan tried to reverse this trend. He asked Congress to consolidate scores of categorical grants into just six large block grants. Congress obliged. Soon state and local governments started getting less federal money, but with fewer strings attached to such grants. During the 1980s and into the early 1990s, however, many states also started spending more of their own money and replacing federal rules on programs with state ones.

With the election of Republican majorities in the House and Senate in 1994, a renewed effort was led by Congress to cut total government spending, roll back federal regulations, and shift important functions back to the states. The first key issue was welfare—that is, Aid to Families with Dependent Children (AFDC). Since 1935, there had been a federal guarantee of cash assistance to states that offered support to low-income, unmarried mothers and their children. In 1996, President Bill Clinton signed a new federal welfare law that ended any federal guarantee of support and, subject to certain rules, turned the management of the program entirely over to the states, aided by federal block grants.

These and other Republican initiatives were part of a new effort called **devolution**, which aimed to pass on to the states many federal functions. It is an old idea, but one that actually acquired new vitality because Congress, rather than the president, was leading the effort. Members of Congress traditionally liked voting for federal programs and categorical grants; that way they could take credit for what they were doing for particular constituencies. Under its new conservative leadership, Congress, especially the House, was looking for ways to scale back the size of the national government. President Clinton seemed to agree when, in his 1996 State of the Union address, he proclaimed that the era of big national government was over.

But was it over? No. By 2010, the federal government was spending about \$30,000 per year per household, which, adjusted for inflation, was its highest annual per-household spending level since World War II.<sup>38</sup> Federal revenues represented almost 30 percent of gross domestic product, close to the late 1970s annual average, and inflation-adjusted federal debt totals hit new highs. Adjusted for inflation, total spending by state and local governments has also increased rapidly in recent years as well, reaching about \$3.2 trillion in 2012, with revenues of approximately \$3 trillion.<sup>39</sup>

Devolution did not become a revolution. AFDC was ended and replaced by a block grant program called Temporary Assistance for Needy Families (TANF). But far larger federal-state programs, most notably Medicaid, were not turned into block grant programs. Moreover, both federal and state spending on most programs, including the block-granted

programs, increased after 1996. Although by no means the only new or significant block grant, TANF now looked like the big exception that proved the rule. The devolution revolution was curtailed by public opinion. Today, as in 1996, most Americans favor “shifting responsibility to the states,” but not if that also means cuts in government programs that benefit most citizens (not just low-income families), uncertainty about who is eligible to receive benefits, or new hassles associated with receiving them.

Devolution seems to have resulted in more, not fewer, government rules and regulations. In response to the federal effort to devolve responsibility to state and local governments, states not only have enacted new rules and regulations of their own, but also have prompted Washington to issue new rules and regulations on environmental protection and other matters.<sup>40</sup> For example, several states and cities sued the Environmental Protection Agency successfully to force it to regulate carbon dioxide and other greenhouse gases as pollutants.<sup>41</sup>

Still, where devolution did occur, it has had some significant consequences. The devolution of welfare policy has been associated with dramatic decreases in welfare rolls. Scholars disagree about how much the drops were due to the changes in law and how much they were caused by economic conditions and other factors. There is also substantial debate over whether new benefits are adequate, or whether the jobs welfare-to-work programs have gotten most recipients are adequate.<sup>42</sup> But few now doubt that welfare devolution has made a measurable difference in how many people receive benefits and for how long.

Subject to state discretion, scores of local governments are now designing and administering welfare programs (job placement, child care, and others) through for-profit firms and a wide variety of nonprofit organizations, including local religious congregations. In some big cities, more than a quarter of welfare-to-work programs have been administered through public-private partnerships that have included various local community-based organizations as grantees.<sup>43</sup>

A major challenge that states face in assuming more responsibilities for public programs is funding. Today, most states have budget shortfalls and face mounting debts for the foreseeable future. While this was due in part to the 2008 financial crisis, a longer-term factor was the role of public sector unions, especially their pensions.<sup>44</sup> Many such pensions are severely underfunded, and could pose serious limits to states’ future spending levels unless changes are made.<sup>45</sup> Consequently, several states (most notably Wisconsin) limited collective bargaining rights for public employees, though it remains to be seen how widely such proposals will spread or how states will manage these challenges more generally.

As states look to reduce costs, they need to consider which responsibilities are theirs to shoulder and which ones the federal government must bear. A 2011 study by the Government Accountability Office found extensive duplication of services both across federal government agencies and between the federal government and the states.<sup>46</sup> Areas of overlap include economic development, food regulation, and counterterrorism. But identifying bureaucratic overlap is easier than eliminating it (as we will see in Chapter 11),

and federal public officials typically have very different views than their state counterparts about what qualifies as “wasteful” spending. Consequently, how states will address their long-term debt, and the implications for further devolution in policymaking, remains to be seen. And, as noted in a 2013 study by the Congressional Budget Office, intergovernmental programs involve administrative costs at multiple levels of government. Any major cost-cutting efforts have to be coordinated between Washington and the states, and that never proves easy.<sup>47</sup>

## Congress and Federalism

Just as it remains to be seen whether the Supreme Court will continue to revive the doctrine of state sovereignty, so it is not yet clear whether the devolution movement will regain momentum, stall, or be reversed. But whatever the movement’s fate, the United States will not become a wholly centralized nation. There remains more political and policy diversity in America than one is likely to find in any other large industrialized nation. The reason is not only that state and local governments have retained certain constitutional protections, but also that members of Congress continue to think of themselves as the representatives of localities *to* Washington and not as the representatives *of* Washington to the localities. As we shall see in Chapter 9, American politics, even at the national level, remains local in its orientation.

But if this is true, why do these same members of Congress pass laws that create so many problems for—and elicit so many complaints from—mayors, governors, and other state and local officials? Members of Congress represent different constituencies from the same localities. For example, one member of Congress from Los Angeles may think of the city as a collection of businesspeople, homeowners, and taxpayers, while another may think of it as a group of African Americans, Hispanics, and nature lovers. If Washington wants to simply send money to Los Angeles, these two representatives could be expected to vote together. But if Washington wants to impose mandates or restrictions on the city, these representatives might very well vote on opposite sides, each voting as his or her constituents would most likely prefer.

When somebody tries to speak “for” a city or state in Washington, that person has little claim to any real authority. The mayor of Philadelphia may favor one program, the governor of Pennsylvania may favor another, and individual local and state officials—school superintendents, the insurance commissioner, public health administrators—may favor still others. In bidding for federal aid, those parts of the state or city that are best organized often do the best, and increasingly these groups are not the political parties but rather specialized occupational groups such as doctors or schoolteachers. If one is to ask, therefore, why a member of Congress does not listen to his or her state anymore, the answer is, “What do you mean by *the state*? Which official, which occupational group, which party leader speaks for the state?”

Finally, Americans differ in the extent to which we prefer federal as opposed to local decisions. When people are asked which level of government gives them the most for

their money, relatively poor citizens are likely to mention the federal government first, whereas relatively well-to-do citizens are more likely to mention local government. If we add to income other measures of social diversity—race, religion, and region—there emerge even sharper differences of opinion about which level of government works best. It is this

social diversity—and the fact that it is represented not only by state and local leaders but also by members of Congress—that keeps federalism alive and makes it so important. Americans simply do not agree on enough things, or even on which level of government ought to decide on those things, to make possible a unitary system.

## LEARNING OBJECTIVES .....

### 3-1 Discuss the historical origins of federalism, and explain how it has evolved over time.

The Framers of the Constitution created a federal system of government for the United States because they wanted to balance the power of the central government with states that would exercise independent influence over most areas of people's lives, outside of national concerns such as defense, coining money, and so forth. Since the Founding, the balance of power between the national government and the states has shifted over time. Overall, the federal government's power and responsibilities have increased, particularly with the expansion of programs in the 20th and 21st centuries. Still, states exercise broad latitude in implementing policies, and frequently they provide models for the federal government to consider in creating national policies.

### 3-2 Summarize the pros and cons of federalism in the United States.

Debates over federalism come down to debates over equality versus participation. Federalism means that citizens living in different parts of the country will be treated differently, not only in spending programs, such as welfare, but also in legal systems that assign in different places different penalties to similar offenses or that differentially enforce civil rights laws. But federalism also means that more opportunities exist for

participation in making decisions—in influencing what is taught in the schools and in deciding where highways and government projects are to be built. Indeed, differences in public policy—that is, unequal treatment—are in large part the result of participation in decision making. It is difficult, perhaps impossible, to have more of one of these values without having less of the other.

### 3-3 Describe how funding underlies federal-state interactions and how this relationship has changed over time.

Funding is perhaps the key link between federal and state governments. In fiscal year 2014, the federal government provided approximately \$577 billion in grants to state and local governments. Many of these grants fund programs designed in Washington but implemented at the state level. Such programs can be contentious because of the mandates and requirements imposed by the federal governments on the states.

### 3-4 Discuss whether the devolution of programs to the states beginning in the 1980s really constitutes a revolution in federal-state relations.

Devolution was not a revolution, but it did generate important changes in programs like welfare. More generally, it continued the shift toward federal programs administered by states.

## TO LEARN MORE .....

State news: [www.stateline.org](http://www.stateline.org)

Council of State Governments: [www.csg.org](http://www.csg.org)

National Governors Association: [www.nga.org](http://www.nga.org)

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## CHAPTER 4

# Civil Liberties

### LEARNING OBJECTIVES

- 4-1** Explain why the courts are so important in defining civil liberties, for both the national government and the states.
- 4-2** Discuss which forms of expression are not protected by the Constitution, and why.
- 4-3** Summarize how the Constitution protects religious freedom.
- 4-4** Explain how in the 21st century, the Constitution protects civil liberties for people accused of crime or designated as “enemy combatants.”

## THEN

In 1803, President Thomas Jefferson wrote to the governor of Pennsylvania complaining about the “licentiousness” of newspapers and urging him and other state leaders to bring about “a few prosecutions of the most prominent offenders.” This would, Jefferson said, have a “wholesome effect in restoring the integrity of the presses.”<sup>1</sup>

## NOW

Today, a president writing such a letter to anyone, especially a governor, would be subject to intense criticism. The prosecution of publishers who had attacked the government would strike most people as outrageous.

There are two differences between then and now. The first, as you will see later in this chapter, is the 1833 Supreme Court decision that the Bill of Rights restricted only the federal government. The only limits on state governments with regards to free speech, a free press, and religious freedom were those found in state constitutions. This law changed after the ratification of the Fourteenth Amendment in 1868 and was (slowly) interpreted by the Supreme Court to mean that the states must also honor freedom for speech, publications, and churches.

The second change occurred in the minds of the American people. Gradually, but particularly in the 20th century, they acquired a libertarian view of personal freedom—a perspective that would suggest the government at every level ought to leave people alone regarding what they say, write, read, or worship.

If you think that civil liberties are an issue only for people who make inflammatory speeches, think again. Imagine, for a moment, that you are a high school student. Dogs trained to sniff out drugs go down your high school corridors and detect marijuana in some lockers. The school authorities open and search your locker without permission or a court order. You are expelled from school without any hearing. Have your liberties been violated?

Angry at what you consider unfair treatment, you decide to wear a cloth American flag sewn to the seat of your pants, and your fellow students decide to wear black armbands to class to protest how you were treated. The police arrest you for wearing a flag on your seat, and the school punishes your classmates for wearing armbands contrary to school regulations. Have your liberties, or theirs, been violated?

You file suit in federal court to find out. We cannot be certain how the court would decide the issues in this particular case, but in similar cases the courts have held that school authorities can use dogs to detect drugs in schools and that these officials can conduct a “reasonable” search of you and your effects, if they have a “reasonable suspicion” that you are violating a school rule. But they cannot punish your classmates for wearing black armbands, they cannot expel you without a hearing, and the state cannot make it illegal to treat the flag “contemptuously” by, for example, sewing it to the seat of your pants. (However, in 2007, the Supreme Court allowed a school principal to punish a student for displaying a flag saying “Bong Hits 4 Jesus” that the official felt endorsed drug use during a school-supervised event.)

So a student’s free-speech rights—and a school’s authority to enforce discipline—now lie somewhere between disgracing a flag (okay) and encouraging drug use (not okay).<sup>2</sup>

Your claim that these actions violated your constitutional rights would have astonished the Framers of the Constitution. They thought they had written a document that

stated what the federal government *could* do, not one that specified what state governments such as school systems *could not* do. And, they thought they had created a national government of such limited powers that it was not even necessary to add a list—a bill of rights—stating what that government was forbidden from doing. It would be enough, for example, that the Constitution did not authorize the federal government to censor newspapers; an amendment prohibiting censorship would be superfluous.

The people who gathered in the state ratifying conventions weren’t so optimistic. They suspected (rightly, as it turned out) that the federal government might well try to do things it was not authorized to do, and so they insisted that the Bill of Rights be added to the Constitution. But even they never imagined that the Bill of Rights would affect what *state* governments could do. Each state would decide that for itself, in its own constitution. And if by chance the Bill of Rights did apply to the states, surely its guarantees of free speech and freedom from unreasonable search and seizure would apply to big issues—the freedom to criticize the government in a newspaper editorial, for example, or to keep the police from breaking down the door of your home without a warrant. The courts would not be deciding who could wear what kinds of armbands or under what circumstances a school could expel a student.

**Civil liberties** are the rights—chiefly, rights to be free of government interference—accorded to an individual by the Constitution: free exercise of religion, free speech, and so on. Civil rights, to be discussed in the next chapter, usually refer to protecting certain groups from discrimination based on characteristics such as their sex, sexual orientation, race, or ethnicity.

In practice, however, there is no clear line between civil liberties and civil rights. For example, is the right to an abortion a civil liberty or a civil right? In this chapter, we take a look at free speech, free press, religious freedom, and the rights of the accused. In the next chapter, we look at discrimination and abortion.

### **civil liberties**

Rights—chiefly, rights to be free of government interference—accorded to an individual by the Constitution: free speech, free press, and so on.

## 4-1 The Courts and Conflicts over Civil Liberties

We often think of “civil liberties” as a set of principles that protect the freedoms of everyone, all of the time. That is true—up to a point. But in fact, the Constitution and the Bill of Rights contain a list of *competing* rights and duties. Often clashes over civil liberties end up in the courts.



## Rights in Conflict

Political struggles over civil liberties follow much the same pattern as interest group politics involving economic issues, even though the claims in question are made by individuals. Indeed, there are formal, organized interest groups concerned with civil liberties. The Fraternal Order of the Police complains about restrictions on police powers; the American Civil Liberties Union defends and seeks to enlarge those restrictions. Catholics have pressed for public support of parochial schools; Protestants and Jews have argued against it. Sometimes the opposing groups are entirely private; sometimes one or both are government agencies.

Competition over civil liberties becomes obvious when one person asserts one constitutional right or duty and another person asserts a different one. For example:

- At the funeral of a Marine killed in Iraq, Fred Phelps and others from a church picketed it with signs saying “Thank God for Dead Soldiers” and other outrageous remarks. (The opening photo for this chapter shows similar picketers outside the Supreme Court.) The Marine’s father sued the church, saying the picketers caused him suffering. Free speech versus extreme emotional distress.
- The U.S. government has an obligation to “provide for the common defense” and, in pursuit of that duty, has claimed the right to keep secret certain military and diplomatic information. The *New York Times* claimed the right to publish such secrets as the “Pentagon Papers” without censorship, citing the Constitution’s guarantee of freedom of the press. A duty versus a right.
- Carl Jacob Kunz delivered inflammatory anti-Jewish speeches on the street corners of a Jewish neighborhood in New York City, suggesting, among other things, that Jews be “burned in incinerators.” The Jewish people living in that area were outraged. The New York City police commissioner revoked Kunz’s license to hold public meetings on the streets. When he continued to air his views on the public streets, Kunz was arrested for speaking without a permit. Freedom of speech versus the preservation of public order.

Even a disruptive high school student’s right not to be victimized by arbitrary or unjustifiable expulsion is in partial conflict with the school’s obligation to maintain an orderly environment in which learning can take place. To address these conflicts, courts must weigh which constitutional protection merits higher protection, and those judgments may change over time. (When the Supreme Court decided the cases given earlier, Phelps, the *New York Times*, and Kunz all won.<sup>3</sup>)

War usually has been the crisis that has restricted the liberty of some minority. For example:

- The Sedition Act was passed in 1798, making it a crime to write, utter, or publish “any false, scandalous, and malicious writing” with the intention of defaming the president, Congress, or the government, or of exciting against the government “the hatred of the people.” The occasion was a kind of half-war between the United States and France, stimulated by fear in this country of the violence following the French Revolution of 1789. The policy entrepreneurs were Federalist politicians who believed that Thomas Jefferson

and his followers not only were supporters of the French Revolution but would, if they came to power, encourage here the kind of anarchy that seemed to exist in France.

- The Espionage and Sedition Acts were passed in 1917–1918, making it a crime to utter false statements that would interfere with the American military, to send through the mail material “advocating or urging treason, insurrection, or forcible resistance to any law of the United States,” or to utter or write any disloyal, profane, scurrilous, or abusive language intended to incite resistance to the United States or to curtail war production. The occasion was World War I; the impetus was the fear that Germans in this country were spies and also that radicals were seeking to overthrow the government. Under these laws, more than 2,000 persons were prosecuted (about half were convicted), and thousands of aliens were rounded up and deported. The policy entrepreneur leading this massive crackdown (the so-called Red Scare) was Attorney General A. Mitchell Palmer.
- The Smith Act was passed in 1940, the Internal Security Act in 1950, and the Communist Control Act in 1954. The Smith Act made it illegal to advocate the overthrow of the U.S. government by force or violence; the Internal Security Act required members of the Communist Party to register with the government; and the Communist Control Act declared the Communist Party to be part of a conspiracy to overthrow the government. The occasions were World War II and the Korean War, which, like earlier wars, inspired fears that foreign agents—in these cases Nazi and Soviet—were trying to subvert the government. For the latter two laws, the policy entrepreneur was Senator Joseph McCarthy, who attracted a great deal of attention



AP Photo/Charlie Riedel

**IMAGE 4-1** A Hispanic girl studies both English and Spanish in a bilingual classroom.



with his repeated, and sometimes inaccurate, claims that Soviet agents were working inside the U.S. government.

These laws had in common an effort to protect the nation from real and imagined threats, posed by people who claimed to be exercising their freedom to speak, publish, organize, and assemble. In each case, the real threat of war led the government to narrow the limits of permissible speech and activity. Almost every time such restrictions were imposed, the Supreme Court was called upon to decide whether Congress (or sometimes state legislatures) had drawn those limits properly. In most instances, the Court tended to uphold the legislatures. But as time passed and the war or crisis ended, popular passions abated and many of the laws proved unimportant.

Though it is uncommon, some use is still made of the sedition laws. In the 1980s, various white supremacists and Puerto Rican nationalists were charged with sedition. In each case, the government alleged that the accused not only had spoken in favor of overthrowing the government, but actually had engaged in violent actions such as bombings. Later in this chapter, we shall see how the Court increasingly has restricted the power of Congress and state legislatures to outlaw political speech; to be found guilty of sedition now, it usually is necessary to do something more serious than just talk about it.

## Cultural Conflicts

In the main, the United States was originally the creation of white European Protestants. Blacks were, in most cases, slaves, and American Indians were not citizens. Catholics and Jews in the colonies composed a small minority, and often a persecuted one. The early schools tended to be religious—that is, Protestant, with many receiving state aid. It is not surprising that under these circumstances a view of America arose that equated “Americanism” with the values and habits of white Anglo-Saxon Protestants.

But immigration to this country brought a flood of new settlers, many of them from very different backgrounds. In the mid-19th century, the potato famine led millions of Irish Catholics to migrate here. At the turn of the century, religious persecution and economic disadvantage brought more people by the millions from southern and eastern Europe, many Catholic or Jewish.

In recent decades, political conflict and economic want have led Hispanics (mostly from Mexico but increasingly from all parts of Latin America), Caribbeans, Africans, Middle Easterners, Southeast Asians, and Asians to come to the United States—most legally, but some illegally. Among them have been Buddhists, Catholics, Muslims, and members of many other religious and cultural groups.

Ethnic, religious, and cultural differences have given rise to different views as to the meaning and scope of certain constitutionally protected freedoms. For example:

- Many Jewish groups find it offensive for a crèche (i.e., a scene depicting the birth of Christ in a manger) to be displayed in front of a government building such as city hall at Christmastime, while many Catholics and Protestants regard such displays as an important part of our cultural heritage. Does a religious display on public property violate

the First Amendment requirement that the government pass no law “respecting an establishment of religion”?

- Many English-speaking people believe that the public schools ought to teach all students to speak and write English because the language is part of our nation’s cultural heritage. Some Hispanic groups argue that the schools should teach pupils in both English and Spanish, since Spanish is part of the Hispanic cultural heritage. Is bilingual education constitutionally required?
- The Boy Scouts of America refuses to allow gay men to become scout leaders even though federal law says sexual orientation may not be cause for discrimination. Many civil libertarians challenged this policy as discriminatory, while the Boy Scouts defended it because their organization was a private association free to make its own rules. (The Supreme Court in 2000 upheld the Boy Scouts on the grounds of their right to associate freely, but in 2015, the organization announced that it would lift the ban.)

Even within a given established cultural tradition, there are important differences of opinion as to the balance between community sensitivities and personal self-expression. To some, the sight of a store carrying pornographic books or a theater showing a pornographic movie is deeply offensive; to others, pornography is offensive but such establishments ought to be tolerated to ensure that laws restricting them do not also restrict politically or artistically important forms of speech; to still others, pornography itself is not especially offensive. What forms of expression are entitled to constitutional protection?

## Applying the Bill of Rights to the States

For many years after the Constitution was signed and the Bill of Rights was added to it as amendments, the liberties these documents detailed applied only to the federal government. The Supreme Court made this clear in a case decided in 1833.<sup>4</sup> Except for Article I, which, among other things, banned ex post facto laws and guaranteed the right of habeas corpus, the Constitution was silent on what the states could not do to their residents.

This began to change after the Civil War, when new amendments were ratified in order to ban slavery and protect newly freed slaves. The Fourteenth Amendment, ratified in 1868, was the most important addition. It said that no state shall “deprive any person of life, liberty, or property without **due process of law** (a phrase now known as the “due process clause”) and that no state shall “deny to any person within its jurisdiction the **equal protection of the laws** (a phrase now known as the “equal protection clause”).

Beginning in 1897, the Supreme Court started to use these two phrases as a way to apply certain rights to state

**due process of law** Denies the government the right, without due process, to deprive people of life, liberty, and property.

**equal protection of the laws** A standard of equal treatment that must be observed by the government.

**freedom of expression**

Right of people to speak, publish, and assemble.

**freedom of religion**

People shall be free to exercise their religion, and government may not establish a religion.

**prior restraint**

Censorship of a publication.

**clear-and-present-danger test**

Law should not punish speech unless there was a clear and present danger of producing harmful actions.

governments. It first said that no state could take private property without paying just compensation, and then in 1925 held, in the *Gitlow* case, that the federal guarantees of free speech and free press also applied to the states. In 1937, it went much further and said in *Palko v. Connecticut* that certain rights should be applied to the states because, in the Court's words, they "represented the very essence of a scheme of ordered liberty" and were "principles of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."<sup>5</sup>

The Supreme Court began the process of selective incorporation by which most, but not all, federal rights also applied to the states. But which rights are so "fundamental" that they ought to govern the states? There is no entirely

clear answer to this question, but in general the entire Bill of Rights is now applied to the states except for the following:

- The right not to have soldiers forcibly quartered in private homes (Third Amendment)
- The right to be indicted by a grand jury before being tried for a serious crime (Fifth Amendment)
- The right to a jury trial in civil cases (Seventh Amendment)
- The ban on excessive bail and fines (Eighth Amendment)

The Second Amendment that protects "the right of the people to keep and bear arms" may or may not apply to the states. In 2008, the Supreme Court in *District of Columbia v. Heller* held for the first time that this amendment did not allow the federal government to ban the private possession of firearms. But the case arose in the District of Columbia, which is governed by federal law. The decision raised two questions. First, will this ruling be incorporated so that it also applies to state governments? In 2010, the Supreme Court said in *McDonald v. Chicago* that the decision in the *Heller* case also applied to the states.<sup>6</sup> Second, will it still be possible to regulate gun purchases and gun use even if the government cannot ban guns? Based on other court cases, the answer appears to be yes.

## 4-2 The First Amendment and Freedom of Expression

The First Amendment contains the language that has been at issue in most of the cases to which we have referred thus far. It has roughly two parts: one protecting **freedom of expression** ("Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of

people peaceably to assemble, and to petition the government for a redress of grievances") and the other protecting **freedom of religion** ("Congress shall make no law respecting an establishment of religion; or abridging the free exercise thereof").

### Speech and National Security

The traditional view of free speech and a free press was expressed by the great English jurist William Blackstone in his *Commentaries*, published in 1765. A free press is essential to a free state, he wrote, but the freedom that the press should enjoy is the freedom from **prior restraint**—that is, freedom from censorship, or rules telling a newspaper in advance what it can publish. Once a newspaper has published an article or a person has delivered a speech, that paper or speaker has to take the consequences if what was written or said proves to be "improper, mischievous, or illegal."<sup>7</sup>

The U.S. Sedition Act of 1798 was in keeping with traditional English law. Like it, the act imposed no prior restraint on publishers; it did, however, make them liable to punishment after the fact. The act was an improvement over the English law, however, because unlike the British model, it entrusted the decision to a jury, not a judge, and allowed the defendant to be acquitted if he or she could prove the truth of what had been published. Although several newspaper publishers were convicted under the act, none of these cases reached the Supreme Court. When Jefferson became president in 1801, he pardoned the people who had been imprisoned under the Sedition Act. Though Jeffersonians objected vehemently to the law, their principal objection was not to the idea of holding newspapers accountable for what they published but to letting the *federal* government do this. Jefferson was perfectly prepared to have the *states* punish what he called the "overwhelming torrent of slander" by means of "a few prosecutions of the most prominent offenders."<sup>8</sup>

It would be another century before the federal government would attempt to define the limits of free speech and writing. Perhaps recalling the widespread opposition to the sweep of the 1798 act, Congress in 1917–1918 placed restrictions not on publications that were critical of the government, but only on those that advocated "treason, insurrection, or forcible resistance" to federal laws or attempted to foment disloyalty or mutiny in the armed services.

In 1919, this new law was examined by the Supreme Court when it heard the case of Charles T. Schenck, who had been convicted of violating the Espionage Act because he had mailed circulars to men eligible for the draft, urging them to resist. At issue was the constitutionality of the Espionage Act and, more broadly, the scope of Congress's power to control speech. One view held that the First Amendment prevented Congress from passing *any* law restricting speech; the other held that Congress could punish dangerous speech. For a unanimous Supreme Court, Justice Oliver Wendell Holmes announced a rule by which to settle the matter. It soon became known as the **clear-and-present-danger test**:

*The question in every case is whether the words used are used in such circumstances and are of*



## CONSTITUTIONAL CONNECTIONS

### Selective Incorporation

The **selective incorporation process**—the process by which the Supreme Court has applied most, but not all, parts of the Bill of Rights to the states—began in earnest in 1925 and has continued ever since, most recently with the Supreme Court's decision in the Second Amendment case of *McDonald v. Chicago*.

The selective incorporation process has never been straightforward or simple. For instance, in *Palko v. Connecticut* (1937), the Supreme Court held that states must observe all “fundamental” rights, but declared that the Fifth Amendment’s protection against “double jeopardy” (being tried, found innocent, and then being tried again for the same crime), which was the issue at hand in the case, was *not* among those rights. It was only about three decades later, in its decision in *Benton v. Maryland* (1969), that the Court partially incorporated the double jeopardy provision of the Fifth Amendment. Still, to this day no provision of the Fifth Amendment has been fully incorporated, and the provision regarding the right to be indicted by a grand jury has not been incorporated at all.

Similarly, in *Powell v. Alabama* (1932), the Supreme Court incorporated the Sixth Amendment’s right to counsel, but only in capital punishment cases. In *Gideon v. Wainwright* (1962), the Court extended that right to all felony defendants that might, if convicted, go to prison for years or for life. In the decade thereafter, the Court issued six more Sixth Amendment selective incorporation decisions. In the last of these, *Argersinger v. Hamlin* (1972), the Court extended the right to legal counsel to any defendant facing a sentence that might result in incarceration.

The Third Amendment, which establishes the right not to have soldiers forcibly “quartered in any home without the consent” of the homeowner, and the Seventh Amendment, which establishes the right to a trial in civil cases, remain wholly unincorporated. The Eighth Amendment’s prohibition against “cruel and unusual punishment” is partially incorporated, while its provision forbidding excessive bail or fines remains wholly unincorporated.

Year	Amendment	Provision	Case
1925	First	Free speech	<i>Gitlow v. New York</i>
1931	First	Free press	<i>Near v. Minnesota</i>
1932	Sixth	Legal counsel	<i>Powell v. Alabama</i>
1937	First	Free assembly	<i>De Jonge v. Oregon</i>
1937	Fifth	Double jeopardy	<i>Palko v. Connecticut</i>
1947	First	No religious establishment	<i>Everson v. Board of Education</i>
1948	Sixth	Public trial	<i>In re Oliver</i>
1949	Fourth	Unreasonable searches and seizures	<i>Wolf v. Colorado</i>
1958	First	Free association	<i>NAACP v. Alabama</i>
1961	Fourth	Warrantless searches and seizures	<i>Mapp v. Ohio</i>
1963	First	Free petition	<i>NAACP v. Button</i>
1963	Sixth	Legal counsel	<i>Gideon v. Wainwright</i>
1965	Sixth	Confront witnesses	<i>Pointer v. Texas</i>
1966	Sixth	Impartial jury	<i>Parker v. Gladden</i>
1967	Sixth	Speedy trial	<i>Klopfer v. North Carolina</i>
1967	Sixth	Compel witnesses	<i>Washington v. Texas</i>
1968	Sixth	Jury trial	<i>Duncan v. Louisiana</i>
1972	Sixth	Legal counsel	<i>Argersinger v. Hamlin</i>
2010	Second	Keep and bear arms	<i>McDonald v. Chicago</i>

*such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.*<sup>9</sup>

The Court held that Schenck’s leaflets did create such a danger, and so his conviction was upheld. In explaining why, Holmes said that not even the Constitution protects a person who has been “falsely shouting fire in a theatre and causing a panic.” In this case, things that might be said safely in peacetime may be punished in wartime.

The clear-and-present-danger test may have clarified the law, but it kept no one out of jail. Schenck went, and so did the defendants in five other cases in the period 1919–1927—even though during this time Holmes, the author of the test, shifted his position and began writing dissenting opinions in which he urged that the test had not been met and so the defendant should go free.

**selective incorporation process** The process whereby the Court has applied most, but not all, parts of the Bill of Rights to the states.



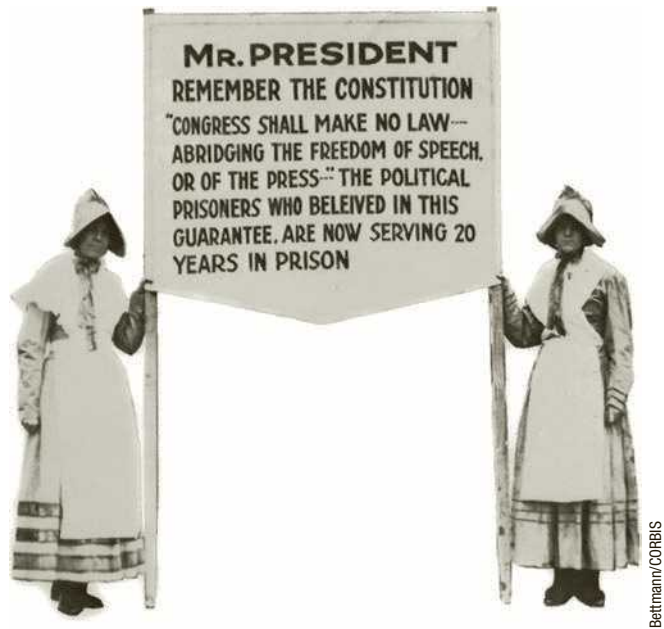
In 1925, Benjamin Gitlow was convicted of violating New York's sedition law—a law similar to the federal Sedition Act of 1918—by passing out some leaflets, one of which advocated the violent overthrow of our government. The Supreme Court upheld his conviction but added, as we have seen, a statement that changed constitutional history: Freedom of speech and of the press were now among the “fundamental personal rights” protected by the due process clause of the Fourteenth Amendment from infringements by *state* action.<sup>10</sup> Thereafter, state laws involving speech, the press, and peaceful assembly were struck down by the Supreme Court for being in violation of the freedom-of-expression guarantees of the First Amendment, made applicable to the states by the Fourteenth Amendment.<sup>11</sup>

The clear-and-present-danger test was a way of balancing the competing demands of free expression and national security. As the memory of World War I and the ensuing Red Scare evaporated, the Court began to develop other tests, ones that shifted the balance more toward free expression.

But when a crisis reappears, as it did in World War II and the Korean War, the Court has tended to defer to legislative judgments about the need to protect national security. For example, it upheld the conviction of 11 Communist Party leaders for having advocated the violent overthrow of the U.S. government, a violation of the Smith Act of 1940.

This conviction once again raised the hard question of the circumstances under which words can be punished. Hardly anybody would deny that actually *trying* to overthrow the government is a crime; the question is whether *advocating* its overthrow is a crime. In the case of the 11 communist leaders, the Court said that the government did not have to wait to protect itself until “the *putsch* [rebellion] is about to be executed, the plans have been laid and the signal is awaited.” Even if the communists were not likely to succeed in their effort, the Court held that specifically advocating violent overthrow could be punished. “In each case,” the opinion read, the courts “must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>12</sup>

But as the popular worries about communists began to subside and the membership of the Supreme Court changed, the Court began to tip the balance even farther toward free expression. By 1957, the Court made it clear



**IMAGE 4-2** Women picketed in front of the White House, urging President Warren Harding to release political radicals arrested during his administration.

that for advocacy to be punished, the government would have to show not just that a person believed in the overthrow of the government but also that he or she was using words “calculated to incite” that overthrow.<sup>13</sup>

By 1969, the pendulum had swung to the point where the speech would have to be judged likely to incite “imminent” unlawful action. When Clarence Brandenburg, a Ku Klux Klan leader in Ohio, made a speech before Klan members in which he called for “revengeance” [sic] against blacks and Jews (described with racial slurs) and called for a march on Washington, he was arrested and convicted for “advocating” violence. The U.S. Supreme Court reversed the conviction, holding that the First Amendment protects speech that abstractly advocates violence unless that speech will incite or produce “imminent lawless action.”<sup>14</sup>

This means that no matter how offensive or provocative some forms of expression may be, this expression has powerful constitutional protections. In 1977, a group of American Nazis wanted to parade through the streets of Skokie, Illinois, a community with a large Jewish population. The outraged residents sought to ban the march. Many feared violence if it occurred. But the lower courts—under prodding from the Supreme Court—held that, despite the Nazi party’s noxious and provocative anti-Semitic slogans, they had a constitutional right to speak and parade peacefully.<sup>15</sup>

Similar reasoning led the Supreme Court in 1992 to overturn a Minnesota statute that made it a crime to display symbols or objects, such as a Nazi swastika or a burning cross, that are likely to cause alarm or resentment among an ethnic or racial group, such as Jews or African Americans.<sup>16</sup> On the other hand, if you are convicted of actually hurting someone, you may be given a tougher sentence if it can be shown that you were motivated to assault them by racial or



## LANDMARK CASES

### Incorporation

- **Gitlow v. New York (1925):** Supreme Court says the First Amendment applies to states.
- **Palko v. Connecticut (1937):** Supreme Court says that states must observe all “fundamental” liberties.
- **McDonald v. Chicago (2010):** The Second Amendment that allows the people to keep and bear arms applies to state governments as well as the federal government.



ethnic hatred.<sup>17</sup> To be punished for such a hate crime, your bigotry must result in some direct and physical harm and not just the display of an odious symbol.

## What Is Speech?

If most political speaking or writing is permissible, save that which actually incites someone to take illegal actions, what *kinds* of speaking and writing qualify for this broad protection? Though the Constitution says that the legislature may make “no law” abridging freedom of speech or the press, and although some justices have argued that this means literally *no* law, the Court has held that there are at least four forms of speaking and writing that are not automatically granted full constitutional protection: libel, obscenity, symbolic speech, and false advertising.

### Libel

A **libel** is a written statement that defames the character of another person. (If the statement is oral, it is called a *slander*.) The libel or slander must harm the person being attacked. In some countries, such as the United Kingdom, it is easy to sue another person for libel and to collect. In this country, it is much harder. For one thing, you must show that the libelous statement was false. If it was true, you cannot collect no matter how badly it harmed you.

A beauty contest winner was awarded \$14 million (later reduced on appeal) when she proved that *Penthouse* magazine had libeled her. Actress Carol Burnett collected a large sum from a libel suit brought against a gossip newspaper. But when Theodore Roosevelt sued a newspaper for falsely claiming that he was a drunk, the jury awarded him damages of only six cents.<sup>18</sup>

If you are a public figure, it is much harder to win a libel suit. A public figure such as an elected official, a candidate for office, an army general, or a well-known celebrity must prove not only that the publication was false and damaging but also that the words were published with “actual malice”—that is,

with reckless disregard for their truth or falsity or with knowledge that they were false.<sup>19</sup> Israeli General Ariel Sharon was able to prove that the statements made about him by *Time* magazine were false and damaging but not that they were the result of “actual malice.”

For a while, people who felt they had been libeled would bring suit in the United Kingdom against an American author. One Saudi leader sued an American author who had accused him of financing terrorism, even though she had not sold her book in the United Kingdom (but word about it had been on the Internet). This strategy of “libel tourism” was ended in 2010, when Congress passed unanimously and the president signed a bill that bars enforcement in U.S. courts of libel actions against Americans if what they published would not be libelous under American law.

**libel** Writing that falsely injures another person.

### Obscenity

Obscenity is not protected by the First Amendment. The Court has always held that obscene materials, because they have no redeeming social value and are calculated chiefly to appeal to one’s sexual rather than political or literary interests, can be regulated by the state. The problem, of course, arises with the meaning of *obscene*. In the period from 1957 to 1968, the Court decided 13 major cases involving the definition of obscenity, which resulted in 55 separate opinions.<sup>20</sup> Some justices, such as Hugo Black, believed that the First Amendment protected all publications, even wholly obscene ones. Others believed that obscenity deserved no protection and struggled heroically to define the term. Still others shared the view of former Justice Potter Stewart, who objected to “hardcore pornography” but admitted that the best definition he could offer was “I know it when I see it.”<sup>21</sup>

It is unnecessary to review in detail the many attempts by the Court at defining obscenity. The justices have made it clear that nudity and sex are not, by definition, obscene and that they will provide First Amendment protection to anything that has political, literary, or artistic merit, allowing the government to punish only the distribution of “hardcore pornography.” Their most recent definition of this is as follows. To be considered obscene, the work, taken as a whole, must be judged by “the average person applying contemporary community standards” to appeal to the “prurient interest,” or to depict “in a patently offensive way, sexual conduct specifically defined by applicable state law” and to lack “serious literary, artistic, political, or scientific value.”<sup>22</sup>

After Albany, Georgia decided that the movie *Carnal Knowledge* was obscene by contemporary local standards, the Supreme Court overturned the distributor’s conviction on the grounds that Albany authorities failed to show that the film depicted “patently offensive hard-core sexual conduct.”<sup>23</sup>

It is easy to make sport of the problems the Court has faced in trying to decide obscenity cases—one conjures up images of black-robed justices leafing through the pages of *Hustler* magazine, taking notes—but these problems reveal, as do other civil liberties cases, the continuing problem of balancing competing claims. One part of the community wants to read or see whatever it wishes; another part wants to



Tim Boyle/Newsweek/Getty Images News/Getty Images

**IMAGE 4-3** A Ku Klux Klan member used his constitutional right to free speech to utter “white power” chants in Skokie, Illinois.

**symbolic speech** An act that conveys a political message.

protect private acts from public degradation. The first part cherishes liberty above all; the second values decency above liberty. The former fears that any restriction on literature will lead to *pervasive* restrictions; the latter believes that reasonable people can distinguish (or reasonable laws can require them to distinguish) between patently offensive and artistically serious work.

Anyone strolling today through an “adult” bookstore must suppose that no restrictions at all exist on the distribution of pornographic works. This condition does not arise simply from the doctrines of the Court. Other factors operate as well, including the priorities of local law enforcement officials, the political climate of the community, the procedures that must be followed to bring a viable court case, the clarity and workability of state and local laws on the subject, and the difficulty of changing the behavior of many people by prosecuting one person. The current view of the Court is that localities can decide for themselves whether to tolerate hard-core pornography; but if they choose not to, they must meet some fairly strict constitutional tests.

The protections given by the Court to expressions of sexual or erotic interest have not been limited to books, magazines, and films. Almost any form of visual or auditory communication can be considered “speech” and is thus protected by the First Amendment. In one case, even nude dancing was given protection as a form of “speech,”<sup>24</sup> although in 1991 the Court held that nude dancing was only “marginally” within the purview of First Amendment protections, and so it upheld an Indiana statute that banned *totally* nude dancing.<sup>25</sup>

Of late some feminist organizations have attacked pornography on the grounds that it exploits and degrades women. They persuaded Indianapolis, Indiana, to pass an ordinance that defined pornography as portrayals of the “graphic, sexually explicit subordination of women” and allowed people to sue the producers of such material. Sexually explicit portrayals of women in positions of equality were not defined as pornography. The Court disagreed. In 1986, it affirmed a lower-court ruling that such an ordinance was a violation of the First Amendment because it represented a legislative preference for one form of expression (women in positions of equality) over another (women in positions of subordination).<sup>26</sup>

One constitutionally permissible way to limit the spread of pornographic materials has been to establish rules governing where in a city they can be sold. When one city adopted a zoning ordinance prohibiting an “adult” movie theater from locating within 1,000 feet of any church, school, park, or residential area, the Court upheld the ordinance, noting that the purpose of the law was not to regulate speech but to regulate the use of land. And in any case, the adult theater still had much of the city’s land area in which to find a location.<sup>27</sup>

With the advent of the Internet, it has become more difficult for the government to regulate obscenity. The Internet spans the globe. It offers an amazing variety of materials—some educational, some entertaining, some sexually explicit. But it is difficult to apply the Supreme Court’s standard for

judging whether sexual material is obscene—the “average person” applying “contemporary community standards”—to the Internet because there is no easy way to tell what “the community” is. Is it the place where the recipient lives or the place where the material originates? And since no one is in charge of the Internet, who can be held responsible for controlling offensive material? Since anybody can send anything to anybody else without knowing the age or location of the recipient, how can the Internet protect children?

When Congress tried to ban obscene, indecent, or “patently offensive” materials from the Internet, the Supreme Court struck down the law as unconstitutional. The Court went even further with child pornography. Though it has long held that child pornography is illegal even if it is not obscene because of the government’s interest in protecting children, it would not let Congress ban pornography involving computer-designed children. Under the 1996 law, it would be illegal to display computer simulations of children engaged in sex even if no real children were involved. The Court said “no.” It held that Congress could not ban “virtual” child pornography without violating the First Amendment because, in its view, the law might bar even harmless depictions of children and sex (e.g., in a book on child psychology).<sup>28</sup>

## Symbolic Speech

Ordinarily, you cannot claim that an illegal act should be protected because that action is meant to convey a political message. For example, if you burn your draft card in protest against the foreign policy of the United States, you can be punished for the illegal act (burning the card), even if your intent was to communicate your beliefs. The Court reasoned that giving such **symbolic speech** the same protection as real speech would open the door to permitting all manner of illegal actions—murder, arson, rape—if the perpetrator meant thereby to send a message.<sup>29</sup>

On the other hand, a statute that makes it illegal to burn the American flag is an unconstitutional infringement of free speech.<sup>30</sup> Why is there a difference between a draft card and the flag? The Court argues that the government has a right to run a military draft and so can protect draft cards, even if this incidentally restricts speech. But the only motive that the government has in banning flag-burning is to restrict this form of speech, and that would make such a restriction improper.

The American people were outraged by the flag-burning decision, and in response the House and Senate passed by huge majorities (380 to 38 and 91 to 9) a law making it a federal crime to burn the flag. But the Court struck this law down as unconstitutional.<sup>31</sup> Now that it was clear that only a constitutional amendment could make flag-burning illegal, Congress was asked to propose one. But it would not. Earlier members of the House and Senate had supported a law banning flag-burning with more than 90 percent of their votes, but when asked to make that law a constitutional amendment, they could not muster the necessary two-thirds majorities. The reason is that Congress is much more reluctant to amend the Constitution than to pass new laws. Several members decided that flag-burning was wrong, but not so wrong or so common as to justify an amendment.

## Commercial and Youthful Speech

If people have a right to speak and publish, do corporations, interest groups, and children have the same right? By and large the answer is yes, though there are some exceptions.

When the attorney general of Massachusetts tried to prevent the First National Bank of Boston from spending money to influence votes in a local election, the Court stepped in and blocked him. The Court held that a corporation, like a person, has certain First Amendment rights. Similarly, when the federal government tried to limit the spending of a group called Massachusetts Citizens for Life (an antiabortion organization), the Court held that such organizations have First Amendment rights.<sup>32</sup> The Court has also told states that they cannot forbid liquor stores to advertise their prices and informed federal authorities that they cannot prohibit casinos from plugging gambling.<sup>33</sup>

When the California Public Utility Commission tried to compel one of the utilities it regulates (the Pacific Gas and Electric Company) to enclose in its customers' monthly bills statements written by groups attacking the utility, the Supreme Court blocked the agency and said that forcing it to disseminate political statements violated the firm's free-speech rights. "The identity of the speaker is not decisive in determining whether speech is protected," the Court said. "Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." In this case, the right to speak includes the choice of what *not* to say.<sup>34</sup>

Even though corporations have some First Amendment rights, the government can place more limits on commercial

than on noncommercial speech. The legislature can place restrictions on advertisements for cigarettes, liquor, and gambling; it can even regulate advertising for some less harmful products, provided that the regulations are tailored narrowly and serve a substantial public interest.<sup>35</sup> If the regulations are too broad or do not serve a clear interest, then ads are entitled to some constitutional protection. For example, the states cannot bar lawyers from advertising or accountants from personally soliciting clients.<sup>36</sup>

A big exception to the free-speech rights of corporations and labor unions groups was imposed by the McCain-Feingold campaign finance reform law passed in 2002. Many groups, ranging from the American Civil Liberties Union and the AFL-CIO to the National Rifle Association and the Chamber of Commerce, felt that the law banned legitimate speech. Under its terms, organizations could not pay for "electioneering communications" on radio or television that "refer" to candidates for federal office within 60 days before the election. But the Supreme Court temporarily struck down these arguments, upholding the law in *McConnell v. Federal Election Commission*. The Court said ads that only mentioned but did not "expressly advocate" a candidate were ways of influencing the election. Some dissenting opinion complained that a Court that had once given free-speech protection to nude dancing ought to give it to political speech.<sup>37</sup> But seven years later, in *Citizens United v. Federal Election Commission*, the Court decided that the part of the McCain-Feingold law that denied corporations and labor unions the right to run ads about an election (independently of a political party's or candidate's campaign) violated their rights to free speech under the Constitution.



Robert Pearce/The Sydney Morning Herald/Fairfax Media via Getty Images

**IMAGE 4-4** "Symbolic speech:" When young men burned their draft cards during the 1960s to protest the Vietnam War, the Supreme Court ruled that it was an illegal act for which they could be punished.



**free-exercise clause**

First Amendment requirement that law cannot prevent free exercise of religion.

**establishment clause**

First Amendment ban on laws “respecting an establishment of religion.”

Under certain circumstances, young people may have less freedom of expression than adults. In 1988, the Supreme Court held that the principal of Hazelwood High School could censor articles appearing in the student-edited newspaper. The newspaper was published using school funds and was part of a journalism class. The principal ordered the deletion of stories dealing with student pregnancies and

the impact of parental divorce on students. The student editors sued, claiming their First Amendment rights had been violated. The Court agreed that students do not “shed their constitutional rights to freedom of speech or expression at

the schoolhouse gate” and that they cannot be punished for expressing on campus their personal views. But students do not have exactly the same rights as adults if the exercise of those rights impedes the educational mission of the school. Students may say things lawfully on campus, as individuals, that they cannot say if they are part of school-sponsored activities (such as plays or school-run newspapers) that are part of the curriculum. School-sponsored activities can be controlled so long as the controls are “reasonably related to legitimate pedagogical concerns.”<sup>38</sup>

## 4-3 The First Amendment and Freedom of Religion

Everybody knows, correctly, the language of the First Amendment that protects freedom of speech and the press, though most people are not aware of how complex these provisions’ legal interpretations have become. But many people also believe, wrongly, that the language of the First Amendment clearly requires the “separation of church and state.” It does not.

What that amendment actually says is quite different and maddeningly unclear. It has two parts. The first, often referred to as the **free-exercise clause**, states that Congress shall make no law prohibiting the “free exercise” of religion. The second, which is called the **establishment clause**, states that Congress shall make no law “respecting an establishment of religion.”

### The Free-Exercise Clause

The free-exercise clause is the clearer of the two, though by no means does it lack ambiguity. Obviously it means that Congress cannot pass a law prohibiting Catholics from celebrating Mass, requiring Baptists to become Episcopalians, or preventing Jews from holding a bar mitzvah. Since the First Amendment has been applied to the states via the due process clause of the Fourteenth Amendment, it means that state governments cannot pass such laws either. In general, the courts have treated religion like speech: You can pretty much do or say what you want so long as it does not cause serious harm to others.

Even some laws that do not appear initially to apply to churches may be unconstitutional if their enforcement imposes particular burdens on churches or greater burdens on some churches than others. For example, a state cannot apply a license fee on door-to-door solicitors when the solicitor is a Jehovah’s Witness selling religious tracts.<sup>39</sup> By the same token, the courts ruled that the city of Hialeah, Florida, cannot ban animal sacrifices by members of an Afro-Caribbean religion called Santeria. Since killing animals generally is not illegal (if it were, there could be no hamburgers or chicken sandwiches served in Hialeah’s restaurants, and rat traps would be unlawful), the ban in this case was clearly directed against a specific religion and hence was unconstitutional.<sup>40</sup>

Having the right to exercise your religion freely does not mean, however, that you are exempt from laws binding other citizens, even when the law goes against your religious beliefs. A man cannot have more than one wife, even if (as once was the case with Mormons) polygamy is thought desirable on



## LANDMARK CASES

### Free Speech and Free Press

- **Schenck v. United States (1919):** Speech may be punished if it creates a clear-and-present-danger of illegal acts.
- **Chaplinsky v. New Hampshire (1942):** “Fighting words” are not protected by the First Amendment.
- **New York Times v. Sullivan (1964):** To libel a public figure, there must be “actual malice.”
- **Tinker v. Des Moines (1969):** Public school students may wear armbands to class protesting against America’s war in Vietnam when such display does not disrupt classes.
- **Miller v. California (1973):** Obscenity is defined as appealing to prurient interests of an average person with materials that lack literary, artistic, political, or scientific value.
- **Texas v. Johnson (1989):** There may not be a law to ban flag-burning.
- **Reno v. ACLU (1997):** A law that bans sending “indecent” material to minors over the Internet is unconstitutional because “indecent” is too vague and broad a term.
- **FEC v. Wisconsin Right to Life (2007):** Campaign finance reform law is prohibited from banning political advocacy.
- **Citizens United v. FEC (2010):** The part of the McCain-Feingold campaign finance reform law that prevents corporations and labor unions from spending money on advertisements (independent of political candidates or parties) in political campaigns is unconstitutional.



religious grounds.<sup>41</sup> For religious reasons, you may oppose being vaccinated or having blood transfusions, but if the state passes a compulsory vaccination law or orders that a blood transfusion be given to a sick child, the courts will not block it on grounds of religious liberty.<sup>42</sup> Similarly, if you belong to an Indian tribe that uses a drug, such as peyote, in religious ceremonies, you cannot claim that your freedom was abridged if the state decides to ban the use of that drug, provided the law applies equally to all.<sup>43</sup> Since airports have a legitimate need for tight security measures, begging can be outlawed in them even if some of the people doing the begging are part of a religious group (in this case, the Hare Krishnas).<sup>44</sup>

Unfortunately, some conflicts between religious belief and public policy are even more difficult to settle. What if you believe on religious grounds that war is immoral? The draft laws have always exempted a conscientious objector from military duty, and the Court has upheld such exemptions. But the Court has gone further: It has said that people cannot be drafted even if they do not believe in a Supreme Being or belong to any religious tradition, so long as their “consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become part of an instrument of war.”<sup>45</sup> Do exemptions on such grounds create an opportunity for some people to evade the draft because of their political preferences? In trying to answer such questions, the courts often have had to try to define religion—no easy task.

And even when there is no question about your membership in a bona fide religion, the circumstances under which you may claim exemption from laws that apply to everybody else are unclear. What if you, a member of the Seventh-Day Adventists, are fired by your employer for refusing on religious grounds to work on Saturday—and then it turns out that you cannot collect unemployment insurance because you refuse to take an available job, one that also requires you to work on Saturday? Or what if you are a member of the Amish sect, which refuses, contrary to state law, to send its children to public schools past the eighth grade? The Court has ruled that the state must pay you unemployment compensation and cannot require you to send your children to public schools beyond the eighth grade.<sup>46</sup>



**IMAGE 4-5** Public schools cannot organize prayers, but private ones can.

These last two decisions, and others like them, show that even the “simple” principle of freedom of religion gets complicated in practice and can lead to the courts’ giving, in effect, preference to members of one church over members of another.

**“wall of separation”**  
Court ruling that government cannot be involved with religion.

## The Establishment Clause

What in the world did the members of the First Congress mean when they wrote into the First Amendment language that prohibited Congress from making a law “respecting” an “establishment” of religion? The Supreme Court has interpreted this vague phrase, more or less consistently, to mean that the Constitution erects a **“wall of separation”** between church and state.

That phrase, so often quoted, is not in the Bill of Rights nor in the debates in the First Congress that drafted the Bill of Rights. It comes from the pen of Thomas Jefferson, who was opposed to having the Church of England become the established church of his native Virginia. (At the time of the Revolutionary War, there were established churches—that is, official, state-supported churches—in at least eight of the 13 former colonies.) But it is not clear that Jefferson’s view was the majority view.

During much of the debate in Congress, the wording of this part of the First Amendment was quite different and much plainer than what finally emerged. Up to the last minute, the clause was intended to read “no religion shall be established by law” or “no national religion shall be established.” The meaning of those words seems quite clear: Whatever the states may do, the federal government cannot create an official, national religion or give support to one religion in preference to another.<sup>47</sup>

But Congress instead adopted an ambiguous phrase, and so the Supreme Court had to decide what it meant. It has declared that these words do not mean simply “no national religion,” but also no government involvement with religion at all, even on a non-preferential basis. They mean, in short, erecting a “wall of separation” between church and state.<sup>48</sup> Though the interpretation of the establishment clause remains a topic of great controversy among judges and scholars, the Supreme Court has adopted this wall-of-separation principle, more or less consistently.

Its first statement of this interpretation was in 1947. The case involved a New Jersey town that reimbursed parents for the costs of transporting their children to school, including parochial (in this case Catholic) schools. The Court decided that this reimbursement was constitutional. But it made it clear that the establishment clause of the First Amendment applied (via the Fourteenth Amendment) to the states, and that among other things it meant that: the government cannot require a person to profess a belief or disbelief in any religion; it cannot aid one religion, some religions, or all religions; and it cannot spend any tax money, however small the amount might be, in support of any religious activities or institutions.<sup>49</sup> The reader may wonder, in view of the Court’s

reasoning, why it allowed the town to pay for busing children to Catholic schools. The answer it gave is that busing is a religiously neutral activity, akin to providing fire and police protection to Catholic schools. Busing, available to public and private school children alike, does not breach the wall of separation.

Since 1947, the Court has applied the wall-of-separation theory to strike down as unconstitutional most efforts to have any officially conducted or sponsored prayer in public schools even if it is nonsectarian,<sup>50</sup> voluntary,<sup>51</sup> or limited to reading a passage of the Bible.<sup>52</sup> Since 1992, it even has been unconstitutional for a public school to ask a rabbi or minister to offer a prayer—an invocation or a benediction—at the school’s graduation ceremony. Since 2000, it has been unconstitutional for a student to lead a prayer at a public high school football game because it was done “over the school’s public address system, by a speaker representing the student body, under the supervision of the school faculty, and pursuant to school policy.”<sup>53</sup> The Court made it clear, however, that public school students could pray voluntarily during school provided that the school or the government did not sponsor that prayer.

Moreover, the Court has held that laws prohibiting teaching the theory of evolution or requiring giving equal time to “creationism” (the biblical doctrine that God created mankind) are religiously inspired and thus unconstitutional.<sup>54</sup> A public school may not allow its pupils to take time out from their regular classes for religious instruction if this occurs within the schools, though “released-time” instruction is acceptable if it is held outside the public school building.<sup>55</sup> The school prayer decisions in particular have provoked a storm of controversy, but efforts to get Congress to propose to the states a constitutional amendment authorizing such prayers have failed.

Almost as controversial have been Court-imposed restrictions on public aid to parochial schools, though here the wall-of-separation principle has not been used to forbid any and all forms of aid. For example, it is permissible for the federal government to provide aid for constructing buildings on denominational (as well as nondenominational) college campuses<sup>56</sup> and for state governments to loan free textbooks to parochial school pupils,<sup>57</sup> grant tax-exempt status to parochial schools,<sup>58</sup> allow parents of parochial school children to deduct their tuition payments on a state’s income tax returns,<sup>59</sup> and pay for computers and deaf children’s sign language interpreters at private and religious schools.<sup>60</sup> But the government cannot pay a salary supplement to teachers who teach secular subjects in parochial schools,<sup>61</sup> reimburse parents for the cost of parochial school tuition,<sup>62</sup> supply parochial schools with services such as counseling,<sup>63</sup> give money with which to purchase instructional materials, require that “creationism” be taught in public schools, or create a special school district for Hasidic Jews.<sup>64</sup>

The Court sometimes changes its mind on these matters. In 1985, it said the states could not send teachers into parochial schools to teach remedial courses for needy children, but 12 years later it decided they could. “We no longer presume,” the Court wrote, “that public employees will inculcate religion simply because they happen to be in a sectarian environment.”<sup>65</sup>



## HOW WE COMPARE

### Church and State

The American government cannot pay for or endorse any church. By contrast, the national governments in the United Kingdom, Greece, Germany, Norway, and Sweden can. Until recently, there were state-supported churches in France, Italy, and Spain. Despite the absence of any governmental support for churches in this country, attendance in churches and synagogues is very high—by some estimates, as much as 40 percent of our population attends these institutions every week. By contrast, in countries that have or have had state-supported churches, church attendance is sparse. Only 4 percent of the English and 5 percent of the French go to church at least once a week.

How would you explain high church attendance in a country where churches lack government backing and low attendance where they have that backing?

Perhaps the most important establishment-clause decision in recent times was the Court ruling that vouchers can be used to pay for children being educated at religious and other private schools. The case began in Cleveland, Ohio, where the state offered money to any family—particularly poor families—whose children attended a school that had performed so badly it was under a federal court order requiring it be managed directly by the state superintendent of schools. The money, a voucher, could be used to send a child to any other public or private school, including schools run by religious groups. The Court held that this plan did not violate the establishment clause because the aid went not to the school, but to the families who were to choose a school.<sup>66</sup>

If you find it confusing to follow the twists and turns of Court policy in this area, you are not alone. The wall-of-separation principle has not been easy to apply, and the Court has begun to alter its position on church-state matters. The Court has tried to sort out the confusion by developing a three-pronged test to determine the circumstances in which government involvement in religious activities is improper.<sup>67</sup>

That involvement is constitutional if it meets these tests:

1. It has a strictly secular purpose.
2. Its primary effect neither advances nor inhibits religion.
3. It does not foster an excessive government entanglement with religion.

No sooner had the test been developed than the Court decided that it was all right for the government of Pawtucket, Rhode Island, to erect a Nativity scene as part of a Christmas display in a local park. Five years later, however, it said Pittsburgh could not put a Nativity scene in front of the courthouse—but could display a menorah (a Jewish symbol

of Chanukah) next to a Christmas tree and a sign extolling liberty. The Court ruled that the crèche had to go (because, being too close to the courthouse, a government endorsement was implied) but the menorah could stay (because, being next to a Christmas tree, it would not lead people to think that Pittsburgh was endorsing Judaism).

When the Ten Commandments are displayed in or near a public building, a deeply divided Court has made some complicated distinctions. It held that it was unconstitutional for two Kentucky counties to put up the Ten Commandments in their courthouses because, the Court decided, the purpose was religious. It did no good for one Kentucky courthouse to surround the Ten Commandments with displays of the Declaration of Independence and the Star Spangled Banner to make the Commandments part of America's political heritage. The Court said it was still a religious effort, even though it noted that there was a frieze containing Moses in the Supreme Court's own building. (This, the opinion held, was not religious.) But when the Ten Commandments were put up outside the Texas state capitol, this was upheld. Justice Stephen Breyer, who forbid the Kentucky display but allowed the Texas one, wrote that in Texas the Commandments now revealed a secular message and, besides, no one had sued to end this display until 40 years after it was erected.<sup>68</sup>

Though the Court has struck down prayer in public schools, it has upheld prayer in Congress (since 1789, the House and Senate open each session with a prayer).<sup>69</sup> A public school cannot have a chaplain, but the armed services

can. The Court has said that the government cannot “advance” religion, but it has not objected to the printing of the phrase “In God We Trust” on the back of every dollar bill.

These distinctions reflect that the Court tends to use the wall-of-separation test when it deals with public schools, but tries to strike a reasonable balance when it deals with Congress or state office buildings—perhaps because schools have a young and captive population, whereas public forums have adult and voluntary membership.

It is obvious that despite its efforts to set forth clear rules governing church-state relations, the Court's actual decisions are hard to summarize. It is deeply divided—some would say deeply confused—on these matters, and so the efforts to define the “wall of separation” will continue to be as difficult as the Court's earlier efforts to decide what is interstate or local commerce (see Chapter 3).

**exclusionary rule**  
Improperly gathered evidence may not be introduced in a criminal trial.

## 4-4 Crime and Due Process

In interpreting the religion clauses of the First Amendment, the central problem has been to determine what they mean; in interpreting those parts of the Bill of Rights affecting people accused of a crime, the central problem has been to determine not only what they mean, but also how to put them into effect. It is not obvious what constitutes an “unreasonable search,” but even if we settle that question, we still must decide how best to protect people against such searches in ways that do not unduly hinder criminal investigations.

That protection can be provided in at least two ways. One is to let the police introduce in court evidence relevant to the guilt or innocence of a person, no matter how it was obtained; then, after the case is settled, punish the police officer or the officer's superiors if the evidence was gathered improperly (e.g., by an unreasonable search). The other way is to exclude improperly gathered evidence from the trial in the first place, even if it is relevant to determining the guilt or innocence of the accused.

Most democratic nations, including the United Kingdom, use the first method; the United States uses the second. Because of this, many of the landmark cases decided by the Supreme Court have been bitterly controversial. Opponents of these decisions have argued that a guilty person should not go free just because the police officer blundered, especially if the mistake was minor. Supporters rejoin that there is no way to punish errant police officers effectively other than by excluding tainted evidence; moreover, nobody should be convicted of a crime except by evidence that is above reproach.<sup>70</sup>



### LANDMARK CASES

#### Religious Freedom

- **Pierce v. Society of Sisters (1925):** Though states may require public education, they may not require that students attend only public schools.
- **Everson v. Board of Education (1947):** The wall-of-separation principle is announced.
- **Zorach v. Clauson (1952):** States may allow students to be released from public schools to attend religious instruction.
- **Engel v. Vitale (1962):** There may not be a prayer, even a nondenominational one, in public schools.
- **Lemon v. Kurtzman (1971):** Three tests are described for deciding whether the government is improperly involved with religion.
- **Lee v. Weisman (1992):** Public schools may not have clergy lead prayers at graduation ceremonies.
- **Santa Fe Independent School District v. Doe (2000):** Students may not lead prayers before the start of a football game at a public school.
- **Zelman v. Simmons-Harris (2002):** The voucher plan to pay school bills is upheld.

### The Exclusionary Rule

The American method relies on what is called the **exclusionary rule**. That rule holds that evidence gathered in violation of the Constitution cannot be used in a trial. The rule has been used to implement two provisions of the Bill of Rights: the right to be free from unreasonable searches and



**search warrant**

A judge's order authorizing a search.

**probable cause**

Reasonable cause for issuing a search warrant or making an arrest; more than mere suspicion.

seizures (Fourth Amendment) and the right not to be compelled to give evidence against oneself (Fifth Amendment).<sup>\*71,72</sup>

Not until 1949 did the Supreme Court consider whether to apply the exclusionary rule to the states. In a case decided that year, the Court made it clear that the Fourth Amendment prohibited the police from carrying out

unreasonable searches and obtaining improper confessions, but held that it was not necessary to use the exclusionary rule to enforce those prohibitions. It noted that other nations did not require that evidence improperly gathered had to be excluded from a criminal trial. The Court said that the local police should not gather and use evidence improperly, but if they did, the remedy was to sue the police department or punish the officer.<sup>73</sup>

But in 1961, the Supreme Court changed its mind about the use of the exclusionary rule. It all began when the Cleveland police broke into the home of Dollree Mapp in search of a suspect in a bombing case. Not finding him, they instead arrested her for possessing some obscene pictures found there. The Court held that this was an unreasonable search and seizure because the police had not obtained a search warrant, though they had had ample time to do so. Furthermore, such illegally gathered evidence could not be used in the trial of Mapp.<sup>74</sup> Beginning with this case—*Mapp v. Ohio*—the Supreme Court required the use of the exclusionary rule as a way to enforce a variety of constitutional guarantees.

## Search and Seizure

After the Court decided to exclude improperly gathered evidence, the next problem was to decide what evidence was gathered improperly. What happened to Dollree Mapp was an easy case; hardly anybody argued that it was reasonable for the police to break into someone's home without a warrant, ransack their belongings, and take whatever they could find that might be incriminating. But that left a lot of hard choices still to be made.

When can the police search you without it being unreasonable? Under two circumstances: when they have a search warrant or when they have lawfully arrested you. A **search warrant** is an order from a judge authorizing the search of a place. The order must describe what is to be searched and seized, and the judge can issue it only if he or she is persuaded by the police that **probable cause** (good reason) exists to believe that a crime has been committed and that the evidence bearing on that crime will be found at

a certain location. The police can also search a building if the occupant gives them permission.

In addition, you can be searched if the search occurs when you are lawfully arrested. When can you be arrested? You can be arrested if a judge has issued an arrest warrant for you, if you commit a crime in the presence of a police officer, or if the officer has probable cause to believe you have committed a serious crime (usually a felony). If you are arrested and no search warrant has been issued, the police—not a judge—decide what they can search. What rules should they follow?

In trying to answer that question, the courts have elaborated a set of rules that are complex, subject to frequent change, and quite controversial. In general, after arresting you, the police can search you, things in plain view, and things or places under your immediate control. As a practical matter, things “in plain view” or “under your immediate control” mean the room in which you are arrested but not other rooms of the house.<sup>75</sup> If the police want to search the rest of your house or a car parked in your driveway, they first will have to go to a judge to obtain a search warrant. But if the police arrest a college student on campus for underage drinking and then accompany that student back to his or her dormitory room so that the student can get proof that he or she was old enough to drink, the police can seize drugs in plain view in that room.<sup>76</sup> And if marijuana is growing in plain view in an open field, the police can enter and search that field even though it is fenced off with a locked gate and a “No Trespassing” sign.<sup>77</sup>

What if you are arrested while driving your car—how much of it can the police search? The answer to that question has changed almost yearly. In 1979, the Court ruled that the police could not search a suitcase taken from a car of an arrested person, and in 1981 it extended this protection to any “closed, opaque container” found in the car.<sup>78</sup> But the following year, the Court decided that all parts of a car, closed or open, could be searched if the officers had probable cause to believe they contained contraband (i.e., goods illegally possessed). And recently, the rules governing car searches have been relaxed even further. Officers who have probable cause to search a car can also search the things passengers are carrying in the car. And if the car is stopped for a traffic infraction, the car can be searched if the officer develops a “reasonable, articulable suspicion” that the car is involved in other illegal activity.<sup>79</sup>

In this confusing area of the law, the Court is attempting to protect those places in which a person has a “reasonable expectation of privacy.” Your body is one such place, and so the Court has held that the police cannot compel you to undergo surgery to remove a bullet that might be evidence of your guilt or innocence in a crime.<sup>80</sup> But the police can require you to take a Breathalyzer test to see whether you have been drinking while driving.<sup>81</sup> Your home is another place where you have an expectation of privacy; but a barn next to your home is not, nor is your backyard viewed from an airplane, nor is your home if it is a motor home that can be driven away, and so the police need not have a warrant to look into these places.<sup>82</sup>

If you work for the government, you have an expectation that your desk and files will be private; nonetheless,

\*We shall consider here only two constitutional limits—those bearing on searches and confessions. Thus we will omit many other important constitutional provisions affecting criminal cases, such as rules governing wiretapping, prisoner rights, the right to bail and to a jury trial, the bar on ex post facto laws, the right to be represented by a lawyer in court, the ban on “cruel and unusual” punishment, and the rule against double jeopardy.



your supervisor may search the desk and files without a warrant, provided that he or she is looking for something related to your work.<sup>83</sup> But bear in mind that the Constitution protects you only from *the government*; a private employer has a great deal of freedom to search your desk and files.

## Confessions and Self-Incrimination

The constitutional ban on being forced to give evidence against oneself was intended originally to prevent the use of torture or “third-degree” police tactics to extract confessions. But it has since been extended to cover many kinds of statements uttered not out of fear of torture, but from lack of awareness of one’s rights—especially the right to remain silent—whether in the courtroom or in the police station.

For many decades, the Supreme Court held that involuntary confessions could not be used in federal criminal trials, but had not ruled that they were barred from state trials. But in the early 1960s, it changed its mind in two landmark cases: *Escobedo* and *Miranda*.<sup>84</sup> The story of the latter and of the controversy that it provoked is worth telling.

Ernesto A. Miranda was convicted in Arizona of the rape and kidnapping of a young woman. The conviction was based on a written confession that Miranda signed after two hours of police questioning. (The victim also identified him.) Two years earlier, the Court had decided that the rule against self-incrimination applied to state courts.<sup>85</sup> Now the question arose of what constitutes an “involuntary” confession. The Court decided that a confession should be presumed involuntary unless the person in custody had been fully and clearly informed of his or her right to be silent, to have an attorney present during any questioning, and to have an attorney provided free of charge if he or she could not afford one. The accused could waive these rights and offer to talk, but the waiver must have been truly voluntary. Since Miranda did not have a lawyer present when he was questioned and had not knowingly waived his right to a lawyer, the confession was excluded from evidence in the trial and his conviction was overturned.<sup>86</sup>

Miranda was tried and convicted again, this time on the basis of evidence supplied by his girlfriend, who testified that he had admitted to her that he was guilty. Nine years later, he was released from prison; four years after that, he was killed in a barroom fight. When the Phoenix police arrested the prime suspect in Ernesto Miranda’s murder, they read him his rights from a “*Miranda* card.”

Anyone who watches crime dramas on television probably knows the “*Miranda* warning” by heart. The police now read it routinely to people whom they arrest. It is not clear whether it has much impact on who does or does not confess or what effect, if any, it may have on the crime rate.

In time, the *Miranda* rule was extended to mean that you have a right to a lawyer when you appear in a police lineup<sup>87</sup> and when you are questioned by a psychiatrist to determine your competency to stand trial.<sup>88</sup> The Court threw out the conviction of a man who had killed a child because the accused, without being given the right to have a lawyer present and having undergone harsh questioning, had

led the police to the victim’s body.<sup>89</sup> However, you do not have a right to a *Miranda* warning if, while in jail, you confess a crime to another inmate who turns out to be an undercover police officer.<sup>90</sup>

Some police departments have tried to get around the need for a *Miranda* warning by training their officers to question suspects before giving them a *Miranda* warning and then, if the suspect confesses, giving the warning and asking the same questions over again. But the Supreme Court has not allowed this and has struck the practice down.<sup>91</sup>

## Relaxing the Exclusionary Rule

Cases such as *Miranda* were highly controversial and led to efforts in Congress to modify or overrule the decisions by statute, without much coming of the attempts. But as the rules governing police conduct became increasingly more complex, pressure mounted to find an alternative. Some thought that any evidence should be admissible, with the question of police conduct left to lawsuits or other ways of punishing official misbehavior. Others felt that the exclusionary rule served a useful purpose but had simply become too technical to be an effective deterrent to police misconduct; the police cannot obey rules that they cannot understand. And still others felt that the exclusionary rule was a vital safeguard to essential liberties and should be kept intact. The Court has refused to let Congress abolish *Miranda* because it is a constitutional rule.<sup>92</sup>

The courts began to decide some cases in ways that modified—but retained—the exclusionary rule. The police were given greater freedom to question juveniles.<sup>93</sup> If the police got a warrant they thought was valid but the judge had used the wrong form, they could use it under the **good faith exception**.<sup>94</sup> The Supreme Court has allowed the police to question a suspect without first issuing a *Miranda* warning if the questions were motivated by overriding considerations of public safety, referred to as a **public safety exception**.<sup>95</sup> And the Court changed its mind about the killer who led the police to the victim’s body. Under the **inevitable discovery** rule, the Court decided that if a victim will be discovered anyway, the evidence will not be excluded.<sup>96</sup>

### **good faith exception**

An error in gathering evidence sufficiently minor that it may be used in a trial.

### **public safety exception**

The police can question an un-Mirandized suspect if there is an urgent concern for public safety.

### **inevitable discovery**

The police can use evidence if inevitably it would have been discovered.

## Terrorism and Civil Liberties

The attacks of September 11, 2001 raised important questions about how far the government can go in investigating and prosecuting individuals.

A little more than one month after the attacks, Congress passed a new law, the USA Patriot Act, designed to increase

federal powers to investigate terrorists.<sup>†</sup> Its main provisions are these:

- *Telephone taps.* The government may tap, if it has a court order, any telephone a suspect uses instead of having to get a separate order for each telephone.
- *Internet taps.* The government may tap, if it has a court order, Internet communications.
- *Voice mail.* The government, with a court order, may seize voice mail.
- *Grand jury information.* Investigators can now share with other government officials things learned in secret grand jury hearings.
- *Immigration.* The attorney general may hold any non-citizen who is thought to be a national security risk for up to seven days. If the alien cannot be charged with a crime or deported within that time, he or she may still be detained if he or she is certified to be a security risk.
- *Money laundering.* The government gets new powers to track the movement of money across U.S. borders and among banks.
- *Crime.* This provision eliminates the statute of limitation on terrorist crimes and increases the penalties.

About a month later, by executive order President Bush proclaimed a national emergency under which any noncitizen believed to be a terrorist or to have harbored a terrorist will be tried by a military, rather than a civilian, court. A military trial is carried on before a commission of military officers and not a civilian jury. The tribunal can operate in secret if classified information is used in evidence. Two-thirds of the commission must agree before the suspect can be convicted and sentenced. If convicted, the suspect can appeal to the secretary of defense and the president, but not to a civilian court. These commissions may eventually be used to try some of the men captured by the U.S. military during its campaign in Afghanistan against the Taliban regime and the al Qaeda terrorist network that was created by Osama bin Laden. The detainees held in a prison at our Guantanamo naval base in Cuba are not regarded by the Defense Department as ordinary prisoners of war.

The biggest legal issue created by this country's war on terrorism is whether our government can hold the people we capture without giving them access to the courts. The traditional view, first announced during World War II, was that a military tribunal instead of a civilian court could try spies sent to this country by the Nazis. They were neither citizens nor soldiers, but "unlawful combatants."<sup>97</sup> The Bush administration relied on this view when it detained, in our military base in Guantanamo Bay, Cuba, men seized by American forces in Afghanistan. These men were mostly members of

the al Qaeda terrorist movement or of the Taliban movement that governed Afghanistan before American armed forces, together with Afghan rebels, defeated them. These men, none of them American citizens, argued that they were neither terrorists nor combatants. They demanded access to American courts. By a vote of six to three, the Supreme Court held that American courts can consider challenges to the legality of the detention of these men. The Court's opinion did not spell out what the courts should do when it hears such petitions.<sup>98</sup>

In another decision given the same day, the Supreme Court ruled on the case of an American citizen who apparently was working with the Taliban regime but was captured by our forces and imprisoned in South Carolina. The Court said that American citizens are entitled to a hearing before a neutral decision maker in order to challenge the basis for detention.<sup>99</sup>

That "neutral decision maker" was created in 2006 by a law authorizing military commissions to try alien enemy combatants—foreign fighters not in uniform, such as members of al Qaeda, who are captured by American forces. Each commission is to be composed of at least five military officers and is to allow the defendant certain fundamental rights (such as to see evidence and testify). Appeals from its decisions can be taken to the Court of Military Review, whose members are selected by the secretary of defense. The federal appeals court for the District of Columbia and, if it wishes, the Supreme Court may hear appeals from the Court of Military Review.<sup>100</sup>

Military commissions have conducted hearings about the inmates in the Guantanamo prison. Some were released, some were held, and for some no decision has been made. Right after he became president, Barack Obama issued an order to close the Guantanamo prison within a year. But there is a problem: What do you do with the inmates? While George W. Bush was president, more than 500 of the nearly 800 inmates were released, but President Obama faced strong domestic opposition to bringing remaining detainees to U.S. prisons. The 2016 defense-spending bill explicitly prohibited the use of funds to close Guantanamo Bay or bring detainees to the United States. Despite his opposition to this provision, President Obama signed the bill.<sup>101</sup>

When it was first passed in 2001, the Patriot Act made certain provisions temporary, perhaps to allay the fears of civil libertarians. When the act was renewed in March 2006, only a few changes were made and almost all of its provisions were made permanent. But certain provisions of the law expired on June 1, 2015 because many members of Congress—both Democrats and Republicans—objected to the mass collection of telephone records that the law had permitted, and which was revealed in 2013 (see "Searches Without Warrants" below). On June 2, 2015, President Obama signed into law the USA Freedom Act, which addressed congressional concerns by requiring the federal government to get special judicial approval (by the Foreign Intelligence Surveillance Court) to receive data collections from telephone companies.<sup>102</sup>

In addition to the Patriot Act, Congress passed and the president signed in 2005 a law that required all states to comply by 2008 with federal standards when they issue

<sup>†</sup>The name of the law is an acronym derived from the official title of the bill, drawn from the first letters of the following capitalized words: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot).



Mark Wilson/Getty Images

**IMAGE 4-6** Inside a cell at the terrorist prison in Guantanamo, where Muslim inmates received a copy of the Koran, a chess set, and an arrow pointing toward Mecca.

driver's licenses. States, not Washington, pass out these licenses, but by mid-2008 the Real ID Act says that no federal agency, including those that manage security at airports, may accept a license or state identification card that does not have the person's photograph, address, signature, and full legal name based on documents that prove he or she is legally in this country. Some people think this amounts to a required national ID card.<sup>103</sup>

## Searches Without Warrants

For many decades, presidents of both parties authorized telephone taps without warrants when they believed the person tapped was a foreign spy. Some did this to capture information about their political enemies. In 1978, Congress decided to bring this practice under legislative control. It passed the Foreign Intelligence Surveillance Act (FISA), which required the president to go before a special court, composed of seven judges selected by the Chief Justice, to obtain approval for electronic eavesdropping on persons thought to be foreign spies. The FISA court would impose a standard lower than that which governs the issuance of warrants against criminals. For criminals, a warrant must be based on showing "probable cause" that the person is engaged in a crime; for FISA warrants, the government need only show that the person is likely to be working for a foreign government.

In late 2005, the *New York Times* and other newspapers revealed that the National Security Agency (NSA), this country's code-breaking and electronic surveillance organization, had a secret program to intercept telephone calls and email messages between certain people abroad and Americans. The Bush administration defended the program, arguing

that the intercepts were designed not to identify criminals or foreign spies, but to alert the country to potential terrorist threats. It could not rely on FISA because its procedures took too long and its standards of proof were too high. Critics of the program said it imperiled the civil liberties of Americans.



## LANDMARK CASES

### Criminal Charges

- ***Mapp v. Ohio* (1961):** Evidence illegally gathered by the police may not be used in a criminal trial.
- ***Gideon v. Wainwright* (1964):** Persons charged with a crime have a right to an attorney even if they cannot afford one.
- ***Miranda v. Arizona* (1966):** Court describes warning that police must give to arrested persons.
- ***United States v. Leon* (1984):** Illegally obtained evidence may be used in a trial if it was gathered in good faith without violating the principles of the *Mapp* decision.
- ***Dickerson v. United States* (2000):** The *Mapp* decision is based on the Constitution and cannot be altered by Congress passing a law.
- ***Rasul v. Bush and Hamdi v. Rumsfeld* (2004):** Terrorist detainees must have access to a neutral court to decide if they are legally held.



The Supreme Court has never spoken on this matter. But every lower federal court, including the court that hears appeals from the FISA court, has agreed that as commander in chief the president has the “inherent authority” to conduct warrantless searches to obtain foreign intelligence information.<sup>104</sup> The administration also argued that after 9/11, when Congress passed a law authorizing the president to exercise “all necessary and appropriate” uses of military force, it included warrantless intercepts of terrorist communications.

In 2008, Congress passed a bill that allowed the government to intercept foreign communications with people in the United States provided the FISA court had approved the surveillance methods. But the administration could begin the surveillance before the FISA ruling was made if it declared the need to be urgent. However, if Americans living overseas are made the target of this surveillance, then there must first be a FISA warrant. Additionally, private telephone and Internet companies that aided in the surveillance were exempt from lawsuits provided they had received “substantial evidence” that the program was authorized by the president.

In 2013, a controversy erupted when news organizations revealed that nine U.S. Internet companies had collaborated with the NSA and British intelligence agencies on a secret and extensive surveillance program. This information became public due to the unauthorized release of thousands of classified government documents by NSA contractor Edward Snowden, who said leaking files to journalists was necessary to make the American people aware of the agency’s alleged constitutional violations. Under risk of arrest in the United States for spying, Snowden eventually was granted temporary asylum in Russia, while an intense public debate weighed whether his actions had harmed national security or provided much-needed scrutiny of government surveillance.<sup>105</sup>

In some ways, civil liberties questions are both like and unlike ordinary policy debates. Like most issues, civil liberties problems often involve competing interests—in this case, conflicting rights or conflicting rights and duties—and so we have groups mobilized on both sides of issues involving free speech and crime control. Like some other issues, civil liberties problems also can arise from the successful appeals of a policy entrepreneur, and so we have periodic reductions in liberty resulting from popular fears, usually during or just after a war.

But civil liberties are unlike many other issues in at least one regard: More than struggles over welfare spending or defense or economic policy, debates about civil liberties reach down into our fundamental political beliefs and political culture—challenging us to define what we mean by religion, Americanism, and decency. The most important of these challenges focuses on the meaning of the First Amendment: What is “speech”? How much of it should be free? How far can the state go in aiding religion? How do we strike a balance between national security and personal expression?

The zigzag course followed by the courts in judging these matters has, on balance, tended to enlarge freedom of expression.

Almost as important has been the struggle to strike a balance between the right of society to protect itself from criminals and the right of people (including criminals) to be free from unreasonable searches and coerced confessions. As with free speech cases, the courts generally have broadened the rights of individuals at some expense to the power of the police. But in recent years, the Supreme Court has pulled back from some of its more sweeping applications of the exclusionary rule.

The resolution of these issues by the courts is political in the sense that differing opinions about what is right or desirable compete, with one side prevailing, often by a small majority. In this competition of ideas, federal judges, though not elected, often are sensitive to strong currents of popular opinion. When politics has produced new action against apparently threatening minorities, judges are inclined to give serious consideration to popular fears and legislative majorities, at least for a while. And when no strong national mood is discernible, the opinions of elites influence judicial thinking (as described in Chapter 12).

At the same time, courts resolve political conflicts in a manner that differs from the resolution of conflicts by legislatures or executives in important respects. First, the very existence of the courts, and the relative ease with which one may enter them to advance a claim, facilitates challenges to accepted values. An unpopular political or religious group may have little or no access to a legislature, but it will have substantial access to the courts.

Second, judges often settle controversies about rights not simply by deciding the case at hand, but by formulating a general rule to cover like cases elsewhere. This has an advantage—the law tends to become more consistent and better known—but a disadvantage as well: a rule suitable for one case may be unworkable in another. Judges reason by analogy and sometimes assume two cases are similar when in fact important differences exist. For example, a definition of “obscenity” or “fighting words” may suit one situation but be inadequate in another.

Third, judges interpret the Constitution, whereas legislatures often consult popular preferences or personal convictions. However much their own beliefs influence what judges read into the Constitution, almost all of them are constrained by its language.

Taken together, the desire to find and announce rules, the language of the Constitution, and the personal beliefs of judges have led to a general expansion of civil liberties. As a result, even allowing for temporary reversals and frequent redefinitions, any value thought to hinder freedom of expression and the rights of the accused has generally lost ground to the claims of the First, Fourth, Fifth, and Sixth Amendments.



## LEARNING OBJECTIVES .....

### 4-1 Explain why the courts are so important in defining civil liberties, for both the national government and the states.

The courts are independent of the executive and legislative branches, both of which will respond to public pressures. In wartime or in other crisis periods, people want “something done.” The president and members of Congress know this. The courts usually are a brake on their demands. Of course, the courts can make mistakes or get things confused, as many people believe they have with the establishment clause and the rights of criminal defendants. Still, when it comes to government respecting civil liberties like the freedom to express unpopular beliefs, the courts are often citizens’ last and best hope.

After the Fourteenth Amendment was adopted in 1868, the Supreme Court began the slow but steady process of “incorporation” by which federal rights deemed “fundamental” also applied to the states. Today, the entire Bill of Rights is now applied to the states except for the following: the Third Amendment right not to have soldiers forcibly quartered in private homes; the Fifth Amendment right to be indicted by a grand jury before being tried for a serious crime; the Seventh Amendment right to a jury trial in civil cases; and the Eighth Amendment ban on excessive bail and fines. Although states still may regulate gun purchases and gun use, the latest incorporated right is the Second Amendment right to own and “bear arms,” which the Court applied to the states in a 2010 decision.

### 4-2 Discuss which forms of expression are not protected by the Constitution, and why.

Four forms of expression that are not protected are the following: libel (injurious written statements about

another person); certain types of symbolic speech (actions that convey a political message); “fighting words” that incite others to commit illegal acts or that directly and immediately provoke another person to violent behavior; and obscenity (writing or pictures that the average person, applying the standards of his or her community, believes appeal to the prurient interest and lack literary, artistic, political, or scientific value).

### 4-3 Summarize how the Constitution protects religious freedom.

The First Amendment bans the federal government, but not the states, from having an “established,” tax-supported church. Some states had tax-funded churches well into the 19th century, but the Supreme Court has long since outlawed state-sponsored churches. The First Amendment also prohibits the federal government from interfering with people’s religious activities.

### 4-4 Explain how in the 21st century, the Constitution protects civil liberties for people accused of crime or designated as “enemy combatants.”

The Constitution includes several due-process protections for people accused of committing a crime: the exclusionary rule (evidence gathered in violation of the Constitution cannot be used in a trial); the need for a search warrant (an order from a judge authorizing the search of a place); the *Miranda* rules (warnings that police must give to a person being arrested regarding the rights of the accused); and others. The Supreme Court has ruled that terrorist detainees and enemy combatants (persons who are neither citizens nor prisoners of war) have constitutionally guaranteed due-process protections.

## TO LEARN MORE .....

Court cases: [www.law.cornell.edu](http://www.law.cornell.edu)

Civil Rights Division of the Department of Justice:  
[www.usdoj.gov](http://www.usdoj.gov)

American Civil Liberties Union: [www.aclu.org](http://www.aclu.org)

American Center for Law and Justice: [www.aclj.org](http://www.aclj.org)

Americans United for Separation of Church and State:  
[www.au.org](http://www.au.org)

Institutional Religious Freedom Alliance:  
[www.irfalliance.org](http://www.irfalliance.org)

Abraham, Henry J., and Barbara A. Perry, *Freedom and the Court*, 7th ed. New York: Oxford University Press, 1998. An analysis of leading Supreme Court cases on civil liberties and civil rights.

Amar, Akhil Reed. *The Constitution and Criminal Procedure: First Principles*. New Haven, CT: Yale University Press, 1997. A brilliant critique of how the Supreme Court has interpreted those parts of the Constitution bearing on search warrants, the exclusionary rule, and self-incrimination.

Berns, Walter. *The First Amendment and the Future of American Democracy*. New York: Basic Books, 1976. A look at what the Founders intended by the First Amendment that takes issue with contemporary Supreme Court interpretations of it.

Clor, Harry M. *Obscenity and Public Morality*. Chicago: University of Chicago Press, 1969. Argues for the legitimacy of legal restrictions on obscenity.

Levy, Leonard W. *Legacy of Suppression: Freedom of Speech and Press in Early American History*. Rev. ed. New York: Oxford University Press, 1985. A careful study of what the Founders and the early leaders meant by freedom of speech and press.



## CHAPTER 5

# Civil Rights

### LEARNING OBJECTIVES

- 5-1** Explain how Supreme Court rulings and federal legislation have attempted to end racial discrimination in the United States.
- 5-2** Explain how Supreme Court rulings and federal legislation have attempted to advance women's rights in the United States.
- 5-3** Discuss the evolution of affirmative-action programs after the Supreme Court and Congress ended racial segregation.
- 5-4** Discuss how Court doctrine and public opinion on gay rights have changed in the 21st century.
- 5-5** Summarize how American political institutions and public opinion have expanded civil rights.



**civil rights** The rights of people to be treated without unreasonable or unconstitutional differences.

## THEN

In 1830, Congress passed a law requiring all Indians (as they were referred to in the law) east of the Mississippi River to move to the Indian Territory west of the river, and the army

set about implementing it. In the 1850s, a major political fight broke out in Boston over whether the police department should be obliged to hire an Irish officer. Until 1920, women could not vote in most elections. In the 1930s, the Cornell University Medical School had a strict quota limiting the number of Jewish students who could enroll. In the 1940s, President Franklin D. Roosevelt ordered that all Japanese Americans be removed from their homes in California and placed in relocation centers far from the coast. Until 1954, public schools in many states were required by law to be segregated by race. Until 1967, 16 states outlawed marriages between whites and nonwhites. Until 2003, 14 states outlawed consensual sexual relations between same-sex partners. Prior to 2004, gays and lesbians could not legally marry anywhere in the United States.

## NOW

Now, it is inconceivable that the army would relocate American Indians forcibly. No one can be denied entry into a police department by reason of race, ethnicity, or religion. Not only have women long had the right to vote, but they now vote at higher rates than men do. Today, unlike during World War II, no group of people can be relocated forcibly or held against their will en masse—and even suspected terrorists and “enemy combatants” cannot be detained indefinitely without having their day in court. The quotas that once limited Jews’ access to colleges and universities are history. State laws requiring segregated public schools and banning interracial marriage are history, too. Just within the last decade,

state laws forbidding consensual sexual relations between same-sex partners have been eliminated—and as of 2015, same-sex marriage is the law of the land.

Still, then as now, if the government passes a law that treats different groups of people differently, that law is not necessarily unconstitutional.

**Civil rights** cases refer to cases in which some group, defined usually along racial or ethnic lines, is denied access to facilities, opportunities, or services that are available to other groups. The pertinent question regarding civil rights is not whether the government has the authority to treat different people differently; it is whether such differences in treatment are reasonable. Many laws and policies make distinctions among people—for example, the tax laws require higher-income people to pay taxes at a higher rate than lower-income people—but not all such distinctions are defensible. The courts have long held that classifying people on the basis of their income and taxing them at different rates is quite permissible because such classifications are not arbitrary or unreasonable, and are related to a legitimate public need (i.e., raising revenue). Increasingly, however, the courts have said that classifying people on the basis of their race or ethnicity is unreasonable.<sup>1</sup>

To explain the victimization of certain groups and the methods by which they have begun to overcome it, we start with racial classifications and the case of African Americans. The strategies employed by or on behalf of African Americans typically have set the pattern for the strategies employed by other groups. At the end of this chapter, we look at the issues of women’s rights and gay rights.

## 5-1 Race and Civil Rights

In July 2013, the National Urban League (NUL)—led by its president, Marc H. Morial, former mayor of New Orleans—came to Philadelphia for its annual conference. Along with the National Association for the Advancement of Colored People (NAACP), the NUL is among the nation’s most historic and important civil rights organizations.

The NUL 2013 conference theme was “Redeem the Dream.” Fifty years earlier, in 1963, Reverend Dr. Martin Luther King, Jr. delivered his historic “I Have a Dream” speech in Washington, D.C. In its 2013 *State of Black America* report, the NUL credited civil rights laws for the progress made over the last half-century or so in closing white-black gaps in education and standards of living:

- The white-black high school completion rate gap had closed by 57 points. Whereas only 25 percent of blacks graduated from high school in 1963, by 2013 the fraction had risen to 85 percent, and there had been a threefold increase in the number of blacks enrolled in college.
- The white-black poverty rate gap fell by 23 points. Whereas 48 percent of blacks lived in poverty in 1963, by 2013 the fraction had fallen to 28 percent.
- There was a 14 percent increase in the number of black homeowners.



SAUL LOEB/Getty Images

**IMAGE 5-1** In March 2015, President Barack Obama, former President George W. Bush, U.S. Representative John Lewis (who was one of the original protestors), and many others participated in the 50th anniversary of the civil rights march in Selma, Alabama.



But the same report also documented numerous racial gaps and disparities in housing, education, health care, employment, and overall economic opportunity:

- In 2013, as in 1963, the black-white unemployment ratio was still 2 to 1—regardless of education, gender, region, or income level.
- In 2013, as in 1963, more than a third of all black children (38 percent) still lived in poverty.
- In 2013, as in 1963, blacks employed in the public sector earned less than whites in the same jobs, and a still-wider black-white wage disparity persisted in the private sector.

Citing the history surrounding Reverend Dr. King's "I Have a Dream" speech, Morial and other leaders called on all citizens to come together in eliminating these and other racial gaps and disparities in housing, education, employment, and other areas. As late as the mid-20th century, African Americans in many parts of the country could not vote, attend integrated schools, ride in the front seats of buses, or buy homes in white neighborhoods. Conditions were especially oppressive in those parts of the country where blacks were often in the majority, notably in the Deep South. There, the politically dominant white minority felt keenly the potential competition for jobs, land, public services, and living space posed by large numbers of people of another race. But even in the North, black gains often appeared to be at the expense of lower-income whites who lived or worked near them, not at the expense of upper-status whites who lived in suburbs.

African Americans were not allowed to vote at all in many areas; they could vote only with great difficulty in others; and even in those places where voting was easy, they often lacked the material and institutional support for effective political organization. If your opponent feels deeply threatened by your demands and can deny you access to the political system that will decide the fate of those demands, you are, to put it mildly, at a disadvantage. Yet from the end of Reconstruction to the 1960s—for nearly a century—many blacks in the South found themselves in just such a position.

To the dismay of those who prefer to explain political action in terms of economic motives, people often attach greater importance to the intangible costs and benefits of policies than to the tangible ones. Thus, even though the average black represented no threat to the average white, anti-black attitudes—racism—produced some appalling actions. Between 1882 and 1946, 4,715 people, about three-fourths of them African Americans, were lynched in the United States.<sup>2</sup> Some of these brutalities were perpetrated by small groups of vigilantes acting with much ceremony, but others were the actions of frenzied mobs. In the summer of 1911, a black man charged with murdering a white man in Livermore, Kentucky, was dragged by a mob to the local theater, where he was hanged. The audience, which had been charged admission, was invited to shoot the swaying body (those in the orchestra seats could empty their revolvers; those in the balcony were limited to a single shot).<sup>3</sup>

Though the public in other parts of the country was shocked by such events, little was done because lynching was a local, not federal, crime. Obviously it would not require

many such horrific killings to dissuade African Americans in these localities from voting, or from enrolling in a white school. And even in those states where black Americans did vote, popular attitudes were not conducive to blacks buying homes or taking jobs on an equal basis with whites.

Even among those who professed to support equal rights, a substantial portion opposed African Americans' efforts to obtain them and federal action to secure them. In 1942, a national poll showed that only 30 percent of white people thought black and white children should attend the same schools; in 1956, the proportion had risen, but only to 49 percent, still less than a majority. In the South, white support for school integration was even lower—14 percent favored it in 1956, about 31 percent in 1963. As late as 1956, a majority of Southern whites were opposed to integrated public transportation facilities. Even among whites who generally favored integration, in 1963—*before* the inner-city riots that occurred later in the decade—there was considerable opposition to the black civil rights movement: nearly half of the whites classified in a survey as moderate integrationists thought demonstrations hurt the black cause; nearly two-thirds disapproved of actions taken by the civil rights movement; and more than a third felt civil rights should be left to the states.<sup>4</sup>

In short, the political position in which African Americans found themselves until the 1960s made it difficult for them to advance their interests through a feasible legislative strategy; their opponents were aroused, organized, and powerful. Thus, if black interests were to be championed in Congress or state legislatures, blacks would need white allies. Though some such allies could be found, they numbered too few to make a difference in a political system that gives a substantial advantage to strongly motivated opponents of any new policy. For that to change, one or both of two things would have to happen: additional allies would have to be recruited (a delicate problem, given that many white integrationists disapproved of aspects of the civil rights movement), or the struggle would have to be shifted to a policymaking arena in which the opposition enjoyed less of an advantage.

Partly by plan, and partly by accident, black leaders followed both of these strategies simultaneously. By publicizing their grievances and organizing a civil rights movement that (at least in its early stages) concentrated on dramatizing the denial to blacks of essential and widely accepted liberties, African Americans were able to broaden their base of support among both political elites and the general public, thereby elevating the importance of civil rights issues on the political agenda. By waging a patient, prolonged, but carefully planned legal struggle, black leaders shifted decision-making power on key civil rights issues from Congress, where they had been stymied for generations, to the federal courts.

After this strategy had achieved some substantial successes—once blacks had become enfranchised and legal barriers to equal participation in political and economic affairs had been lowered—the politics of civil rights became more conventional. African Americans were able to assert their demands directly in the legislative and executive branches of government with reasonable, though scarcely certain, prospects of success. Civil rights became less a

**separate-but-equal doctrine** The doctrine established in *Plessy v. Ferguson* (1896) that African Americans constitutionally could be kept in separate but equal facilities.

matter of gaining entry into the political system and more one of waging interest group politics within that system.

At the same time, the goals of civil rights politics broadened. The struggle to gain entry into the system had focused on the denial of fundamental rights (to vote, to organize, to

obtain equal access to schools and public facilities). Since then, dominant issues have included economic progress, professional advancement, and improvement of housing and neighborhoods. But these battles can reveal denial of fundamental legal rights as well. With housing, for example, both private lenders and government agencies such as the Federal Housing Authority have pursued strategies to make home ownership more difficult for African Americans, such as “redlining” neighborhoods—that is, either denying loans or making them more expensive. After the horrific, fatal injuries received in police custody in 2015 by Baltimore resident Freddie Gray, a 25-year-old African American man, riots ensued in the city. Its long-standing problems of segregation and poverty commanded national attention, particularly their roots, at least partly, in purposely discriminatory public policy.<sup>5</sup>

## The Campaign in the Courts

The Fourteenth Amendment was both an opportunity and a problem for black activists. Adopted in 1868, it seemed to guarantee equal rights for all: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

The key phrase was “equal protection of the laws.” Read broadly, it might mean that the Constitution should be regarded as color-blind: No state law could have the effect of treating whites and blacks differently. Thus, a law segregating blacks and whites into separate schools or neighborhoods would be unconstitutional. Read narrowly, “equal protection” might mean only that blacks and whites had certain fundamental legal rights in common (such as the right to sign contracts, to serve on juries, or to buy and sell property), but otherwise they could be treated differently.

In a series of decisions beginning in the 1870s, the Supreme Court took the narrow view, albeit often by narrow majorities. Adopted in 1870, the Fourteenth Amendment had been proposed as a means to reinforce the civil rights Act of 1866. That Act was intended by Congress to ensure that former slaves’ citizenship rights would be respected not only by the federal government but by the state governments, both North and South. But in its 5-to-4 majority decision in the *Slaughter-House Cases* (1873), the Court ruled that the “privileges and immunities” clause of the Fourteenth Amendment did not protect citizens from discriminatory actions by state governments. Though in 1880 it declared unconstitutional a West Virginia law requiring juries to be composed

only of white males,<sup>6</sup> the Court decided in 1883 that it was unconstitutional for Congress to prohibit racial discrimination in public accommodations such as hotels.<sup>7</sup> The difference between the two cases seemed, in the eyes of the Court, to be this: Serving on a jury was an essential right of citizenship that the state could not deny to any person on racial grounds without violating the Fourteenth Amendment, but registering at a hotel was a convenience controlled by a private person (the hotel owner) who could treat blacks and whites differently if he or she wished.

The major decision that determined the legal status of the Fourteenth Amendment for more than half a century was *Plessy v. Ferguson*. Louisiana had passed a law requiring blacks and whites to occupy separate cars on railroad trains operating in that state. When Adolph Plessy, who was seven-eighths white and one-eighth black, refused to obey the law, he was arrested. He appealed his conviction to the Supreme Court, claiming that the law violated the Fourteenth Amendment. In 1896, the Court rejected his claim, holding that the law treated both races equally even though it required them to be separate. The equal protection clause guaranteed political and legal, but not social, equality. “Separate-but-equal” facilities were constitutional because if “one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane.”<sup>8</sup>

## “Separate But Equal”

Thus began the **separate-but-equal doctrine**. Three years later, the Court applied it to schools as well—declaring in *Cumming v. Richmond County Board of Education* that a decision in a Georgia community to close the black high school while keeping open the white high school was not a violation of the Fourteenth Amendment, because blacks could always go to private schools. Here the Court seemed to be saying that not only could schools be separate, they could even be unequal.<sup>9</sup>

What the Court has made, the Court can unmake. But to get it to change its mind requires a long, costly, and uncertain legal battle. The NAACP was the main organization that waged that battle against the precedent of *Plessy v. Ferguson*. Formed in 1909 by white and black individuals in the aftermath of a race riot, the NAACP undertook many efforts, which included lobbying in Washington and publicizing black grievances (especially in the pages of *The Crisis*, a magazine edited by W. E. B. Du Bois). But its most influential role was played in the courtroom.

It was a rational strategy. Fighting legal battles does not require forming broad political alliances or changing public opinion, tasks that would have been very difficult for a small and unpopular organization. A court-based approach also enabled the organization to remain non-partisan. But it was a slow and difficult strategy. The Court had adopted a narrow interpretation of the Fourteenth Amendment. To get the Court to change its mind, the NAACP would have to bring before it cases involving the strongest possible claims that a black had been unfairly treated—and under circumstances sufficiently different from those of earlier cases, so that the Court could find some grounds for changing its mind.

The steps in that strategy were these: First, persuade the Court to declare unconstitutional laws creating schools that were separate but obviously unequal. Second, persuade it to declare unconstitutional laws supporting schools that were separate but unequal in not-so-obvious ways. Third, persuade it to rule that racially separate schools were inherently unequal and hence unconstitutional.

### Can Separate Schools Be Equal?

The first step was accomplished in a series of court cases stretching from 1938 to 1948. In 1938, the Court held that Lloyd Gaines had to be admitted to an all-white law school in Missouri, because no black law school of equal quality existed in that state.<sup>10</sup> In 1948, the Court ordered the all-white University of Oklahoma Law School to admit Ada Lois Sipuel, a black woman, even though the state planned to build a black law school later. For education to be equal, it had to be equally available.<sup>11</sup> It still could be separate, however: The university admitted Ms. Sipuel but required her to attend classes in a section of the state capitol, roped off from other students, where she could meet with her law professors.

The second step was taken in two cases decided in 1950. Heman Sweatt, an African American man, was treated by the University of Texas Law School much as Ada Sipuel had been treated in Oklahoma: “admitted” to the all-white school but relegated to a separate building. Another African American man, George McLaurin, was allowed to study for his Ph.D. in a “colored section” of the all-white University of Oklahoma. The Supreme Court decided unanimously that these arrangements were unconstitutional because, by imposing racially based barriers on the black students’ access to professors, libraries, and other students, they created unequal educational opportunities.<sup>12</sup>

The third step, the climax of the entire drama, began in Topeka, Kansas, where Linda Brown wanted to enroll in her neighborhood school but could not because she was black and the school was by law reserved exclusively for whites. When the NAACP took her case to the federal district court in Kansas, the judge decided the black school Linda could attend was substantially equal in quality to the white school she could not attend and, therefore, denying her access to the white school was constitutional. To change that, the lawyers would have to persuade the Supreme Court to overrule the district judge on the grounds that racially separate schools were unconstitutional even if they were equal. In other words, the separate-but-equal doctrine would have to be overturned by the Court.

It was a risky and controversial step to take. Many states, Kansas among them, were trying to make their all-black schools equal to those of whites by launching expensive building programs. If the NAACP succeeded in getting separate schools declared unconstitutional, the Court might well put a stop to the building of these new schools. Blacks could win a moral and legal victory but suffer a practical defeat—the loss of these new facilities. Despite these risks, the NAACP decided to go ahead with the appeal.

### **Brown v. Board of Education**

On May 17, 1954, a unanimous Supreme Court, speaking through an opinion written and delivered by Chief Justice Earl Warren, found that “in the field of public education the doctrine of ‘separate but equal’ has no place” because “separate educational facilities are inherently unequal.”<sup>13</sup> *Plessy v. Ferguson* was overruled, and “separate but equal” was dead.

The ruling was a landmark decision, but the reasons for it and the means chosen to implement it were as important and as controversial as the decision itself. There were at least three issues. First, how would the decision be implemented? Second, on what grounds were racially separate schools unconstitutional? Third, what test would a school system have to meet in order to be in conformity with the Constitution?

**Implementation** The *Brown* case involved a class-action suit; that is, it applied not only to Linda Brown but to all others similarly situated. This meant that black children everywhere now had the right to attend formerly all-white schools. This change would be one of the most far-reaching and conflict-provoking events in modern American history. It could not be effected overnight or by the stroke of a pen. In 1955, the Supreme Court decided it would let local federal district courts oversee the end of segregation by giving them the power to approve or disapprove local desegregation plans. This was to be done “with all deliberate speed.”<sup>14</sup>

In the South, “all deliberate speed” turned out to be a snail’s pace. Massive resistance to desegregation broke out in many states. Some communities simply defied the Court; some sought to evade its edict by closing their public schools. In 1956, more than 100 Southern members of Congress signed a “Southern Manifesto” that condemned the *Brown* decision as an “abuse of judicial power” and pledged to “use all lawful means to bring about a reversal of the decision.”

In the late 1950s and early 1960s, the National Guard and regular army paratroopers were used to escort black students into formerly all-white schools and universities. It was not until the 1970s that resistance collapsed and most Southern schools were integrated. The use of armed force convinced people that resistance was futile; the disruption of the politics and economy of the South convinced leaders that it was imprudent; and the voting power of blacks convinced politicians that it was suicidal. In addition, federal laws began providing financial aid to integrated schools and withholding it from segregated ones. By 1970, only 14 percent of Southern black schoolchildren still attended all-black schools.<sup>15</sup>

**The Rationale** As the struggle to implement the *Brown* decision continued, the importance of the rationale for that decision became apparent. The case was decided in a way that surprised many legal scholars.

The Court could have said that the equal protection clause of the Fourteenth Amendment makes the Constitution, and thus state laws, color-blind. Or it could have said that the authors of the Fourteenth Amendment meant to ban segregated schools. It did neither. Instead, it said segregated





AP Images/Douglas Martin

**IMAGE 5-2** Dorothy Counts, the first black student to attend Harding High School in Charlotte, North Carolina, tries to maintain her poise as she is taunted by shouting, gesticulating white students in September 1957.

### ***de jure* segregation**

Racial segregation that is required by law.

### ***de facto* segregation**

Racial segregation that occurs in schools, not as a result of the law, but as a result of patterns of residential settlement.

education is bad because it “has a detrimental effect upon the colored children” by generating “a feeling of inferiority as to their status in the community” that may “affect their hearts and minds in a way unlikely ever to be undone.”<sup>16</sup> This conclusion was supported by a footnote reference to social science studies of the apparent impact of segregation on black children.

Why did the Court rely on social science as much as or more than the Constitution in supporting its decision? Apparently, for two reasons.

One was the justices’ realization that the authors of the Fourteenth Amendment may *not* have intended to outlaw segregated schools. The schools in Washington, D.C. were segregated when the amendment was proposed; when this fact was mentioned during the debate, it seems to have been made clear that the amendment was not designed to abolish this segregation. When Congress debated a civil rights act a few years later, it voted down provisions that would have ended segregation in schools.<sup>17</sup> The Court could not base its decision easily on a constitutional provision that had, at best, an uncertain application to schools.

The second reason grew out of the first. On so important a matter, the chief justice wanted to speak for a unanimous

court. Some justices did not agree that the Fourteenth Amendment made the Constitution color-blind. In the interests of harmony, the Court found an ambiguous rationale for its decision.

**Desegregation versus Integration** That ambiguity led to the third issue. If separate schools were inherently unequal, what would “unseparate” schools look like? Since the Court had not said race was irrelevant, an “unseparate” school could be either one that blacks and whites were free to attend if they chose, or one that blacks and whites attended whether they wanted to or not. The first might be called a desegregated school, and the latter an integrated school. Think of the Topeka case. Was it enough that there was now no barrier to Linda Brown’s attending the white school in her neighborhood? Or was it necessary that there be black children (if not Linda, then some others) actually going to that school together with white children?

As long as the main impact of the *Brown* decision lay in the South, where laws had prevented blacks from attending white schools, this question did not seem important. Segregation by law (***de jure* segregation**) was now clearly unconstitutional. But in the North, laws had not kept blacks and whites apart; instead, all-black and all-white schools were the result of residential segregation, preferred living patterns, informal social forces, and administrative practices (such as drawing school district lines to produce single-race schools). This often was called segregation in fact (***de facto* segregation**).

In 1968, the Supreme Court settled the matter. In New Kent County, Virginia, the school board had created





MPI/Getty Images

**IMAGE 5-3** In 1963, Governor George Wallace of Alabama stood in the doorway of the University of Alabama to block the entry of black students. Facing him is U.S. Deputy Attorney General Nicholas Katzenbach.

a “freedom-of-choice” plan under which every pupil would be allowed to attend the school of his or her choice without legal restriction. As it turned out, all the white children chose to remain in the all-white school, and 85 percent of the black children remained in the all-black school. The Court rejected this plan as unconstitutional because it did not produce the “ultimate end,” which was a “unitary, nonracial system of education.”<sup>18</sup> In the opinion written by Justice William Brennan, the Court seemed to indicate that the Constitution required actual racial mixing in the schools, not just the repeal of laws requiring racial separation.

This impression was confirmed three years later when the Court considered a plan in North Carolina, under which pupils in Mecklenburg County (which includes Charlotte) were assigned to the nearest neighborhood school without regard to race. As a result, about half the black children now attended formerly all-white schools, with the other half attending all-black schools. The federal district court held that this was inadequate and ordered some children to be bused into more distant schools in order to achieve a greater degree of integration. The Supreme Court, now led by Chief Justice Warren Burger, upheld the district judge on the grounds that the court plan was necessary to achieve a “unitary school system.”<sup>19</sup>

This case—*Swann v. Charlotte-Mecklenburg Board of Education*—pretty much set the guidelines for all subsequent cases involving school segregation. The essential features of those guidelines are as follows:

- To violate the Constitution, a school system must have engaged in discrimination by law, practice, or regulation. Put another way, a plaintiff must show intent to discriminate on the part of the public schools.
- The existence of all-white or all-black schools in a district with a history of segregation creates a presumption of intent to discriminate.
- The remedy for past discrimination will not be limited to freedom of choice, or what the Court called “the walk-in school.” Remedies may include racial quotas in the assignment of teachers and pupils, redrawn district lines, and court-ordered busing.
- Not every school must reflect the social composition of the school system as a whole.

Relying on *Swann*, district courts have supervised redistricting and busing plans in localities all over the nation, often in the face of bitter opposition from the community. In Boston, the control of the city schools by federal judge W. Arthur Garity lasted for more than a decade, and involved him in every aspect of school administration. One major issue not settled by *Swann* was whether busing and other remedies should cut across city and county lines. In some places, the central-city schools had become virtually all black. Racial integration could be achieved only by bringing black pupils to white suburban schools or moving white pupils into central-city

### **suspect classification**

Classifications of people based on their race or ethnicity; laws so classifying people are subject to “strict scrutiny.”

### **strict scrutiny**

The standard by which “suspect classifications” are judged. To be upheld, such a classification must be related to a “compelling government interest,” be “narrowly tailored” to achieve that interest, and use the “least restrictive means” available.



## CONSTITUTIONAL CONNECTIONS

### Suspect Classifications

Beginning with the *Brown* case, virtually every form of racial segregation imposed by law has been struck down as unconstitutional. Race has become a **suspect classification** in that any law making racial distinctions is now subject to **strict scrutiny**. To be upheld as constitutional, a suspect classification must be related to a “compelling government interest,” be “narrowly tailored” to achieve that interest, and use the “least restrictive means” available. But the Court has also determined that though race is a suspect classification, the

Constitution is not “color-blind,” and so the government may make racial distinctions for the purpose of remedying past racial discrimination. Later in this chapter, we discuss affirmative action—the laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership.

schools. In a series of split-vote decisions, the Court ruled that court-ordered intercity busing could be authorized only if it could be demonstrated that the suburban areas as well as the central city had in fact practiced school segregation. Where that could not be shown, such intercity busing would not be required. The Court was not persuaded that intent had been proved in Atlanta, Detroit, Denver, Indianapolis, and Richmond, but it was persuaded that it had been proved in Louisville and Wilmington.<sup>20</sup>

The importance the Court attaches to intent means that if a once-integrated school system becomes all black as a result of white residents moving to the suburbs, the Court will not require that district lines be redrawn constantly, or new busing plans be adopted to adjust to the changing population distribution.<sup>21</sup> This in turn means that as long as blacks and whites live in different neighborhoods for whatever reason, there is a good chance that some schools in both areas will be heavily of one race. If mandatory busing plans or other integration measures cause whites to move out of a city at a faster rate than they otherwise would (a process often called “white flight”), then efforts to integrate the schools may in time create more single-race schools. Ultimately, integrated schools will exist only in integrated neighborhoods or where the quality of education is so high that both blacks and whites want to enroll in the school, even at some cost in terms of travel and inconvenience.

Mandatory busing to achieve racial integration has been a deeply controversial program and has generated considerable public opposition. A study in the 1980s found that a majority of people opposed it.<sup>22</sup> A 2000 poll found that about one-third of white people surveyed thought that it was “not the business” of the federal government to ensure “that black and white children go to the same schools,” and that figure was even higher in the states of the former confederacy.<sup>23</sup> Presidents Richard Nixon, Gerald Ford, and Ronald Reagan opposed busing; all three supported legislation to prevent or reduce it, and Reagan petitioned the courts to reconsider busing plans. The courts refused to reconsider, and Congress has passed only minor restrictions on busing.

The reason Congress has not followed public opinion on this matter is complex. It has been torn between the desire

to support civil rights and uphold the courts and the desire to represent the views of its constituents. Because it faces a dilemma, Congress has taken both sides of the issue simultaneously. By the late 1980s, busing was a dying issue in Congress, in part because no meaningful legislation seemed possible and in part because popular passion over busing had abated somewhat.

Then, in 1992, the Supreme Court made it easier for local school systems to reclaim control over their schools from the courts. In DeKalb County, Georgia (a suburb of Atlanta), the schools had been operating under court-ordered desegregation plans for many years. Despite this effort, full integration had not been achieved, largely because the county’s neighborhoods increasingly had become either all black or all white. The Court held that local schools could not be held responsible for segregation caused solely by segregated living patterns and so the courts would have to relinquish their control over the schools. In 2007, the Court said race could not be the decisive factor in assigning students to schools that either had never been segregated (as in Seattle), or where legal segregation had long since ended (as in Jefferson County, Kentucky).<sup>24</sup>

## The Campaign in Congress

Though slow and costly, the campaign in the courts for desegregated schools was a carefully managed effort to alter the interpretation of a constitutional provision. But to get new civil rights laws out of Congress required a far more difficult and decentralized strategy—one that was aimed at mobilizing public opinion and overcoming the many congressional barriers to action.

The first problem was to get civil rights on the political agenda by convincing people that something had to be



## LANDMARK CASES

### Civil Rights

- **Dred Scott case, Scott v. Sanford (1857):** Established that Congress had no authority to ban slavery in a territory. A slave was considered a piece of property.
- **Plessy v. Ferguson (1896):** Upheld separate-but-equal facilities for white and black people on railroad cars.
- **Brown v. Board of Education (1954):** Said separate public schools are inherently unequal, thus starting racial desegregation.
- **Green v. County School Board of New Kent County (1968):** Banned a freedom-of-choice plan for integrating schools, suggesting blacks and whites must actually attend racially mixed schools.
- **Swann v. Charlotte-Mecklenburg Board of Education (1971):** Approved busing and redrawing district lines as ways of integrating public schools.



STR/FILE UPI Photo Service/Newscom

**IMAGE 5-4** In the 1970s, antibusing protestors picketed against sending children out of neighborhoods to desegregate schools.

done. This could be achieved by dramatizing the problem in ways that tugged at the conscience of whites who were not racist, but ordinarily were indifferent to black problems. Brutal lynching of blacks had shocked these whites, but the practice of lynching was on the wane in the 1950s.

Civil rights leaders could, however, arrange for dramatic confrontations between blacks claiming some obvious right and the whites who denied it to them. Beginning in the late 1950s, these confrontations began to occur in the form of sit-ins at segregated lunch counters and “freedom rides” on segregated bus lines. Around the same time, efforts were made to register blacks to vote in counties where whites had used intimidation and harassment to prevent it.

The best-known campaign occurred in 1955–1956 in Montgomery, Alabama, where blacks—led by a young minister named Martin Luther King, Jr.—boycotted the local bus system after it had Rosa Parks, a black woman, arrested because she refused to surrender her seat on a bus to a white man.

These early demonstrations were based on the philosophy of **civil disobedience**—that is, peacefully violating a law (such as one requiring blacks to ride in a segregated section of a bus) and allowing oneself to be arrested as a result.

But the momentum of protest, once unleashed, could not be directed centrally or confined to nonviolent action. A rising tide of anger, especially among younger blacks, resulted in the formation of more militant organizations and the spontaneous eruption of violent demonstrations and riots in dozens of cities across the country. From 1964 to 1968, there were in the North as well as the South several “long, hot summers” of racial violence.

The demonstrations and rioting succeeded in getting civil rights on the national political agenda, but at a cost: many whites, opposed to the demonstrations or appalled by the riots, dug in their heels and fought against making any concessions to “lawbreakers,” “troublemakers,” and “rioters.” In 1964 and again in 1968, more than two-thirds of the whites interviewed in opinion polls said the civil rights movement was pushing too fast, had hurt the black cause, and was too violent.<sup>25</sup>

In short, a conflict existed between the agenda-setting and coalition-building aspects of the civil rights movement. This was especially a problem since conservative Southern legislators still controlled many key congressional committees that had for years been the graveyard of civil rights legislation. The Senate Judiciary Committee was dominated by a coalition of Southern Democrats and conservative Republicans; the House Rules Committee was under the control of a chairman hostile to civil rights bills, Howard Smith of Virginia. Any bill that passed the House faced an almost certain filibuster in the Senate. Finally, President John F. Kennedy was reluctant to submit strong civil rights bills to Congress.

Several developments made it possible to break the deadlock. First, public opinion was changing. From the mid-1950s to the mid-1990s, surveys found that the proportion of whites who were willing to have their children attend a school that was half black increased sharply (though the proportion of whites willing to have their children attend a school that was predominantly black increased by much less). About the same change could be found in white attitudes toward allowing blacks equal access to hotels and buses.<sup>26</sup> Of course, support in principle

for these civil rights measures was not necessarily the same as support in practice; nonetheless, clearly a major shift was occurring in popular approval of at least the principles of civil rights. At the leading edge of this change were young, college-educated people.<sup>27</sup>

Second, the media—especially television—portrayed vividly certain violent reactions by white segregationists to black demonstrators in ways that gave the civil rights cause a powerful moral force. In May 1963, the head of the Birmingham police, Eugene “Bull” Connor, ordered his men to use attack dogs and high-pressure fire hoses to repulse a peaceful march by African Americans demanding desegregated public facilities and increased job opportunities. The pictures of that confrontation (such as the one on p. 86) created a national sensation and contributed greatly to the massive participation—by whites and blacks alike—in the “March on Washington” that summer. About a quarter of a million people gathered in front of the Lincoln Memorial to hear the Reverend Dr. Martin Luther King, Jr. deliver the aforementioned “I Have a Dream” speech, now regarded as one of the most significant public addresses in American history, and which today is read, studied, or memorized in whole or in part by millions of schoolchildren each year. The following summer in Neshoba County, Mississippi, three young civil rights workers (two white and one black) were brutally murdered by Klansmen aided by the local sheriff. When the FBI identified the murderers, the effect galvanized national public opinion; no white Southern leader could continue persuasive opposition to federal laws protecting voting rights when white law enforcement officers had killed students working to protect those rights. And the next year, a white woman, Viola Liuzzo, was shot and killed while driving a car used to transport civil rights workers. Her death was the subject of a presidential address.

Third, President John F. Kennedy was assassinated in Dallas, Texas, in November 1963. Many people originally (and wrongly) thought he had been killed by a right-wing conspiracy. Even after the assassin had been caught and shown to have left-wing associations, the shock of the president’s murder—in a Southern city—helped build support for efforts by new president Lyndon B. Johnson, a Texan, to obtain passage of a strong civil rights bill as a memorial to the slain president.

Fourth, the 1964 elections not only returned Johnson to office with a landslide victory but also sent a huge Democratic majority to the House and retained the large Democratic margin in the Senate. This made it possible for Northern Democrats to outvote or outmaneuver Southerners in the House.

The cumulative effect of these forces, as well as other significant events, led to the enactment of five civil rights laws between 1957 and 1968. Three (1957, 1960, and 1965) were directed chiefly at protecting the right to vote; one (1968) was aimed at preventing discrimination in housing; and one (1964), the most far-reaching of all, dealt with voting, employment, schooling, and public accommodations.

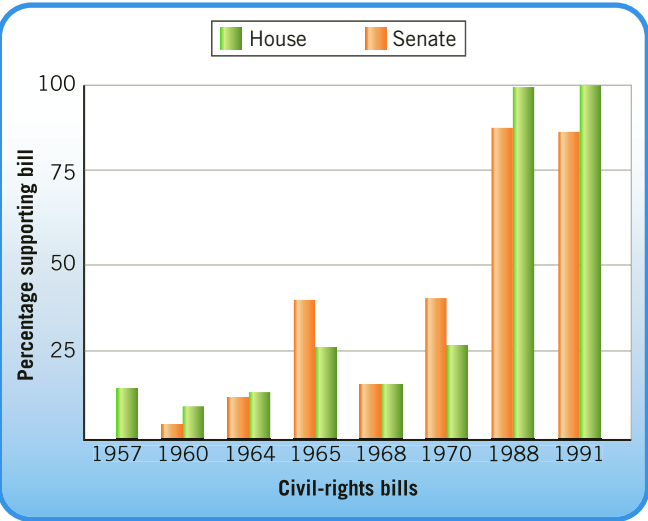
**civil disobedience**  
Opposing a law one considers unjust by disobeying it peacefully and accepting the resultant punishment.



The passage of the 1964 act was the high point of the legislative struggle. Liberals in the House had drafted a bipartisan bill, but it was now in the House Rules Committee, where such proposals had often disappeared without a trace. In the wake of Kennedy’s murder, a discharge petition was filed—with President Johnson’s support—to take the bill out of committee and bring it to the floor of the House. But the Rules Committee, without waiting for a vote on the petition (which it probably realized it would lose), sent the bill to the floor, where it passed overwhelmingly. In the Senate, an agreement between Republican minority leader Everett Dirksen and President Johnson smoothed the way for passage in several important respects. The House bill was sent directly to the Senate floor, thereby bypassing the Southern-dominated Judiciary Committee. Nineteen Southern senators began an eight-week filibuster against the bill. On June 10, 1964, by a vote of 71 to 29, cloture was invoked and the filibuster ended—the first time in history that a filibuster aimed at blocking civil rights legislation had been broken.

Since the 1960s, congressional support for civil rights legislation has grown. Indeed, while once calling a bill a civil rights measure would have been the kiss of death, today that is no longer the case. For example, in 1984 the Supreme Court decided the federal ban on discrimination in education applied only to the “program or activity” receiving federal aid and not to the entire school or university.<sup>28</sup> In 1988, Congress passed a bill to overturn this decision by making it clear that antidiscrimination rules applied to the entire

**FIGURE 5-1** Increase in Support among Southern Democrats in Congress for Civil Rights Bills, 1957–1991



**Source:** Congressional Quarterly, *Congress and the Nation*, vols. 1, 2, 3, 7, 8.

educational institution and not just to that part (say, the physics lab) receiving federal money. When President Reagan vetoed the bill (because, in his view, it would diminish the freedom of church-affiliated schools), Congress overrode the veto. In the override vote, every Southern Democrat in the Senate and almost 90 percent of those in the House voted for the bill.

This was a dramatic change from 1964, when more than 80 percent of the Southern Democrats in Congress voted against the civil rights Act (see Figure 5-1). This change reflected in part the growing political strength of Southern blacks. In 1960, less than one-third of voting-age blacks in the South were registered to vote; by 1971 more than half were, and by 1984 two-thirds were.

In 2008, Barack Obama was elected president and became the first African American to hold the nation’s highest elected office. That monumental historic moment, which included Obama winning two Southern states, was preceded by four decades of growth in the number of black elected officials at all levels of government. Between 1970 and 2010, the total number of black elected officials rose from fewer than 1,500 to more than 10,000 (see Table 5-1).

**TABLE 5-1** Increase in Number of Black Elected Officials

	1970	2010
Federal Office	10	43
State Office	169	642
Local Office	1,290	9,800

**Source:** “A Time to Reflect: Charting the Quality of Life for Black Americans: Politics,” *USA Today*, February 21, 2011.



**IMAGE 5-5** This picture of a police dog lunging at a black man during a racial demonstration in Birmingham, Alabama, in May 1963 was one of the most influential photographs ever published. It was widely reprinted throughout the world and was frequently referred to in congressional debates on the civil rights bill of 1964.



In the presidential elections of 2008 and 2012, voter turnout rates among African Americans equaled or exceeded that of whites. Such parity in voter turnout rates and the aforementioned increase in the number of black elected officials could not have happened without civil rights laws like the Voting Rights Act (VRA) of 1965.

In 2006, following more than 20 public hearings and with support from then President George W. Bush, Congress reauthorized the VRA's key provisions for another quarter-century. This included the section (Section 4) designating the "preclearance" formula used to determine which state or local jurisdictions must have any major changes to their voting laws or procedures approved in advance by the U.S. Department of Justice or by a federal court. The bill's partisan backers cited the need to remain vigilant in checking any recurrence of old methods of discrimination along with concerns about "racial gerrymandering," the proliferation of "voter identification" laws, and other measures that could adversely and disproportionately affect minority participation in the electoral process.

But in 2013, in the case of *Shelby County v. Holder*, the Supreme Court struck down the VRA's preclearance formula as unconstitutional. Writing for the Court's five-to-four majority, Chief Justice John Roberts declared "things have changed dramatically" in the South since 1965; he also issued a statement from the bench indicating that Congress "may draft another formula based on current conditions." Writing for the four dissenting justices, Justice Ruth Bader Ginsburg declared that the majority had "failed to grasp why the VRA has proven effective"; she also issued a statement from the bench stressing that in 2006 Congress "found that 40 years has not been sufficient time to eliminate the vestiges of discrimination following 100 years of disregard for the Fifteenth Amendment." President Obama issued a statement in which he observed that the decision "upsets decades of well-established practices that help to make sure voting is fair, especially in places where voting discrimination has been historically prevalent"; he also called on Congress to pass new voting rights legislation.



**IMAGE 5-6** Reverend Dr. Martin Luther King, Jr. delivers his "I Have a Dream" speech on the Washington, D.C., mall in 1963.

## 5-2 Women and Equal Rights

The political and legal efforts to secure civil rights for African Americans were accompanied by efforts to expand the rights of women. There was an important difference between the two movements, however: whereas African Americans were arguing against a legal tradition that aimed explicitly to keep them in a subservient status, women had to argue against a tradition that claimed to protect them. For example, in 1908 the Supreme Court upheld an Oregon law that limited female laundry workers to a 10-hour workday against the claim that it violated the Fourteenth Amendment. The Court justified its decision with this language:

*The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing ... the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.<sup>29</sup>*

The origin of the movement to give more rights to women was probably the Seneca Falls Convention held in 1848. Its leaders began to demand the right to vote for women. Though this was slowly granted by several states, especially in the West, it was not until 1920 that the Nineteenth Amendment made it clear that no state may deny the right to vote on the basis of sex. The great change in the status of women, however, took place during World War II—when the demand for workers in our defense plants led to the employment of millions of women, such as "Rosie the Riveter," in jobs they had rarely held before. After the war, the feminist movement took flight with the publication in 1963 of *The Feminine Mystique* by Betty Friedan.

Congress responded by passing laws that required equal pay for equal work, prohibited discrimination on the basis of sex in employment and among students in any school or university receiving federal funds, and banned discrimination against pregnant women on the job.<sup>30</sup>

At the same time, the Supreme Court was altering the way it interpreted the Constitution. The key passage was the Fourteenth Amendment, which prohibits any state from denying to "any person" the "equal protection of the laws." For a long time the traditional standard, as we saw in the 1908 case, was a kind of protective paternalism. By the early 1970s, however, the Court had changed its mind. In deciding whether the Constitution bars all, some, or no sexual discrimination, the Court had a choice among three standards.

The first standard is the *reasonableness* standard. This says that when the government treats some classes of people differently from others—for example, applying statutory rape laws to men but not to women—the different treatment must be reasonable and not arbitrary.

The second standard is *intermediate scrutiny*. When women complained that some laws treated them unfairly, the Court adopted a standard somewhere between the reasonableness and strict scrutiny tests. Thus, a law that treats men and women differently must be more than merely reasonable, but the allowable differences need not meet the strict scrutiny test.

And so, in 1971, the Court held that an Idaho statute was unconstitutional because it required that males be preferred over females when choosing people to administer the estates of deceased children. To satisfy the Constitution, a law treating men and women differently “must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of legislation so that all persons similarly circumstanced shall be treated alike.”<sup>31</sup> In later decisions, some members of the Court wanted to make classifications based on sex inherently suspect and subject to the strict scrutiny test, but no majority has yet embraced this position.<sup>32</sup>

The third standard is *strict scrutiny*. This says that some instances of drawing distinctions between different groups of people—for example, by treating whites and blacks differently—are inherently suspect; thus, the Court will subject them to strict scrutiny to ensure they are clearly necessary to attain a legitimate state goal.

But sexual classifications can also be judged by a different standard. The civil rights Act of 1964 prohibits sex discrimination in the hiring, firing, and compensation of employees. The 1972 civil rights Act bans sex discrimination in local education programs receiving federal aid. These laws apply to *private*, and not just government, actions. The Lilly Ledbetter Fair Pay Act of 2009 extends the time period for workers to file a lawsuit against their employer alleging pay discrimination.<sup>33</sup>

## Women’s Rights and the Supreme Court

Over the years, the Court has decided many cases involving sexual classification. The following lists provide several examples of illegal sexual discrimination (violating either the Constitution or a civil rights act) and legal sexual distinctions (violating neither).

### Illegal Discrimination

- A state cannot set different ages at which men and women legally become adults.<sup>34</sup>
- A state cannot set different ages at which men and women are allowed to buy beer.<sup>35</sup>
- Women cannot be barred from jobs by arbitrary height and weight requirements.<sup>36</sup>
- Employers cannot require women to take mandatory pregnancy leaves.<sup>37</sup>
- Girls cannot be barred from Little League baseball teams.<sup>38</sup>
- Business and service clubs, such as the Junior Chamber of Commerce and Rotary Club, cannot exclude women from membership.<sup>39</sup>

- Though women as a group live longer than men, an employer must pay them monthly retirement benefits equal to those received by men.<sup>40</sup>
- High schools must pay the coaches of girls’ sports the same as they pay the coaches of boys’ sports.<sup>41</sup>

### Decisions Allowing Differences Based on Sex

- A law that punishes males but not females for statutory rape is permissible; men and women are not “similarly situated” with respect to sexual relations.<sup>42</sup>
- All-boy and all-girl public schools are permitted if enrollment is voluntary and quality is equal.<sup>43</sup>
- States can give widows a property-tax exemption not given to widowers.<sup>44</sup>
- The navy may allow women to remain officers longer than men without being promoted.<sup>45</sup>

The lower federal courts have been especially busy in the area of sexual distinctions. They have said that public taverns may not cater to men only and that girls may not be prevented from competing against boys in noncontact high school sports; on the other hand, hospitals may bar fathers from the delivery room. Women may continue to use their maiden names after marriage.<sup>46</sup>

In 1996, the Supreme Court ruled that women must be admitted to the Virginia Military Institute, until then an all-male state-supported college that had for many decades supplied what it called an “adversative method” of training to instill physical and mental discipline in cadets. In practical terms, this meant the school was very tough on students. The Court said that for a state to justify spending tax money on a single-sex school, it must supply an “exceedingly persuasive justification” for excluding the other gender. Virginia countered by offering to support an all-female training course at another college, but this was not enough.<sup>47</sup> This decision came close to imposing the strict scrutiny test, and so it has raised important questions about what could happen to all-female or traditionally black colleges that accept state money.



## LANDMARK CASES

### Women’s Rights

- **Reed v. Reed (1971):** Gender discrimination violates the equal protection clause of the Constitution.
- **Craig v. Boren (1976):** Gender discrimination can be justified only if it serves “important governmental objectives” and is “substantially related to those objectives.”
- **Rostker v. Goldberg (1981):** Congress can draft men without drafting women.
- **United States v. Virginia (1996):** State may not finance an all-male military school.

Perhaps the most far-reaching cases defining the rights of women have involved the draft and abortion. In 1981, the Court held in *Rostker v. Goldberg* that Congress may require men but not women to register for the draft without violating the due process clause of the Fifth Amendment.<sup>48</sup> In the area of national defense, the Court will give great deference to congressional policy. For many years, women could be pilots and sailors but not on combat aircraft or combat ships. The issue played a role in preventing the ratification of the Equal Rights Amendment to the Constitution because of fears that it would reverse *Rostker v. Goldberg*. But in 1993, the secretary of defense opened air and sea combat positions to all persons regardless of gender; only ground-troop combat positions were still reserved for men. Two decades later the ban on women serving in combat was lifted as well, and in the summer of 2015, for the first time, two women graduated from Ranger School, the Army's elite combat training and leadership course.

## Sexual Harassment

When Paula Corbin Jones accused President Bill Clinton of sexual harassment, the judge threw the case out of court because she had not submitted enough evidence such that, if the jury believed her story, she would have made a legally adequate argument that she had been sexually harassed.

What, then, is sexual harassment? Drawing on rulings by the Equal Employment Opportunities Commission, the Supreme Court has held that harassment can take one of two forms. First, it is illegal for someone to request sexual favors as a condition of employment or promotion. This is the “quid pro quo” rule. If a person does this, the employer is “strictly liable.” Strict liability means the employer can be found at fault even if he or she did not know a subordinate was requesting sex in exchange for hiring or promotion.

Second, it is illegal for an employee to experience a work environment that has been made hostile or intimidating by a steady pattern of offensive sexual teasing, jokes, or obscenity. But employers are not strictly liable in this case; they can be found at fault only if they were “negligent”—that is, they knew about the hostile environment but did nothing about it.

In 1998, the Supreme Court decided three cases that made these rules either better or worse, depending on your point of view. In one, it determined that a school system was not liable for the conduct of a teacher who seduced a female student because the student never reported the actions. In a second, it held that a city was liable for a sexually hostile work environment confronting a female lifeguard even though she did not report this to her superiors. In the third, it decided that a female employee who was not promoted after having rejected the sexual advances of her boss could recover financial damages from the firm. But, it added, the firm could have avoided paying this bill if it had put in place an “affirmative defense” against sexual exploitation, although the Court never said what such a policy might be.<sup>49</sup>

Sexual harassment is a serious matter, but because there are few federal laws governing it, we are left with somewhat vague and often inconsistent court and bureaucratic rules to guide us.

## Privacy and Sex

Regulating sexual matters traditionally has been left up to the states, which do so by exercising their **police powers**.

These powers include more than the authority to create police departments; they include all laws designed to promote public order and secure the safety and morals of the citizens. Some have argued that the Tenth Amendment to the Constitution, by reserving to the states all powers not delegated to the federal government, meant that states could do anything not prohibited explicitly by the Constitution. But that changed when the Supreme Court began expanding the power of Congress over business and when it started to view sexual matters under the newly discovered right to privacy.

Until that point, it had been left up to the states to decide whether and under what circumstances a woman could obtain an abortion. For example, New York allowed abortions during the first 24 weeks of pregnancy, while Texas banned it except when the mother's life was threatened. That began to change in 1965, when the Supreme Court held that the states could not prevent the sale of contraceptives because by so doing it would invade a “zone of privacy.” Privacy is nowhere mentioned in the Constitution, but the Court argued that it could be inferred from “penumbras” (literally, shadows) cast off by various provisions of the Bill of Rights.<sup>50</sup>

Eight years later the Court, in its famous *Roe v. Wade* decision, held that a “right to privacy” is “broad enough to encompass a woman's decision whether or not to terminate a pregnancy.”<sup>51</sup> The case, which began in Texas, produced this view: During the first three months (or trimester) of pregnancy, a woman has an unfettered right to an abortion. During the second trimester, states may regulate abortions but only to protect the mother's health. In the third trimester, states might ban abortions.

In reaching this decision, the Court denied that it was trying to decide when human life began—at the moment of conception, at the moment of birth, or somewhere in between. But that is not how critics of the decision saw things. To them, life begins at conception, and so the human fetus is a “person” entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment. People having this view began to use the slogans “right to life” and “pro-life.” Supporters of the Court's action saw matters differently. In their view, no one can say for certain when human life begins; what one *can* say, however, is that a woman is entitled to choose whether or not to have a baby. These people took the slogans “right to choose” and “pro-choice.”

Almost immediately, the congressional allies of pro-life groups introduced constitutional amendments to overturn *Roe v. Wade*, but none passed Congress. Nevertheless, abortion foes did persuade Congress, beginning in 1976, to bar the use of federal funds to pay for abortions except when the life of the mother is at stake. This provision is known as the Hyde Amendment, after its sponsor, Representative Henry Hyde. The chief effect of the amendment has been

**police powers** State power to effect laws promoting health, safety, and morals.





## LANDMARK CASES

### Privacy and Abortion

- ***Griswold v. Connecticut (1965)***: Found a “right to privacy” in the Constitution that would ban any state law against selling contraceptives.
- ***Roe v. Wade (1973)***: Determined that state laws prohibiting abortion were unconstitutional.
- ***Webster v. Reproductive Health Services (1989)***: Allowed states to ban abortions from public hospitals and permitted doctors to test to see if fetuses were viable.
- ***Planned Parenthood v. Casey (1992)***: Reaffirmed *Roe v. Wade* but upheld certain limits on its use.
- ***Gonzales v. Carhart (2007)***: Determined that federal law may ban certain forms of partial-birth abortion.
- ***Whole Women’s Health v. Hellerstedt (2016)*** – Overturned Texas law requiring hospital standards at abortion clinics and admitting privileges for clinic doctors at nearby hospitals, for creating an “undue burden” upon women seeking the procedure.

#### equality of results

Making certain that people achieve the same result.

#### equality of opportunity

Giving people an equal chance to succeed.

to deny the use of Medicaid funds to pay for abortions for low-income women.

Despite pro-life opposition, the Supreme Court for 16 years steadfastly reaffirmed and even broadened its decision in *Roe v. Wade*. It struck down laws requiring a woman to have the consent of her husband before an abortion could

be performed, an “emancipated” but underage girl to have the consent of her parents, or a woman to be advised by her doctor as to the facts about abortion.<sup>52</sup>

But in 1989, under the influence of justices appointed by President Reagan, the Court began in the *Webster* case to uphold some state restrictions on abortions. When that happened, many people predicted that in time *Roe v. Wade* would be overturned, especially if President George H. W. Bush was able to appoint more justices. He appointed two (Souter and Thomas), but *Roe* survived. Justices O’Connor, Souter, and Kennedy cast the key votes. In 1992, in its *Casey* decision, the Court refused explicitly by a vote of five to four to overturn *Roe*, declaring that there was a right to abortion.

At the same time, however, it upheld a variety of restrictions imposed by the state of Pennsylvania on women seeking abortions. These included a mandatory 24-hour waiting period between the request for an abortion and the

performance of it, the requirement that teenagers obtain the consent of one parent (or, in special circumstances, of a judge), and a requirement that women contemplating an abortion receive pamphlets about alternatives. Similar restrictions had been enacted in many other states, all of which looked to the Pennsylvania case for guidance as to whether they could be enforced. In allowing these restrictions, the Court overruled some of its own earlier decisions.<sup>53</sup> On the other hand, the Court did strike down a state law that would have required married women to obtain the consent of their husbands before having an abortion.

After a long political and legal struggle, in 2007 the Court upheld a federal law that bans certain kinds of partial-birth abortions. The law does not allow an abortion in which the fetus, still alive, is withdrawn until its head is outside the mother and then it is killed. But the law does not ban a late-term abortion if it is necessary to protect the physical health of the mother or if it is performed on an already dead fetus, even if the doctor has already killed it.<sup>54</sup>

The debate over abortion continues today, especially at the state level, as we mentioned in Chapter 3. Between 2011 and 2013, there were 205 new abortion laws passed, many of them seeking to restrict access to abortion; in contrast, between 2001 and 2010, only 189 new laws were passed.<sup>55</sup> Many of these laws put restrictions on the facilities where abortions can be performed, though others restrict how and when doctors and other health care providers can perform abortions.

In 2016, an eight-member Supreme Court (following the death of Justice Antonin Scalia) decided 5-3 to overturn a Texas law that had required abortion clinics to provide hospital-standard low-risk surgical facilities, and have hospital admitting privileges within thirty miles of the clinic for doctors. The law had led to the closing of the majority of clinics in the state, and the Court ruled that the restrictions created an “undue burden” (a test created in the 1992 *Casey* case) for women seeking to have an abortion. The Court also voted unanimously not to issue a ruling over whether religious non-profit organizations and hospitals should have to follow the “contraceptive mandate” in the Affordable Care Act. Instead, the Court returned seven cases to appeals courts that had issued conflicting decisions (eight in favor of the mandate, and one opposed; not all of the rulings were appealed) to work out a compromise, with no taxes or penalties imposed upon groups opposing the provision in the meantime.

There is one irony in all of this: “*Roe*,” the pseudonym for the woman who started the suit that became *Roe v. Wade*, never had an abortion; and many years later, using her real name, Norma McCorvey, became an evangelical Christian who published a book and started a ministry to denounce abortions.

## 5-3 Affirmative Action

A common thread running through the politics of civil rights is the argument between **equality of results** and **equality of opportunity**. These concepts are central to the debate over affirmative action as a means of attaining equal rights for Americans regardless of race or gender.



## Equality of Results

One view, expressed by some civil rights and feminist organizations, is that the burdens of racism and sexism can be overcome only by taking race or sex into account in designing remedies. It is not enough that people be given rights; they also must be given benefits. If life is a race, everybody must be brought up to the same starting line (or possibly even to the same finish line). This means that the Constitution is not and should not be color-blind or sex-neutral.

In education, this implies that the races must actually be mixed in the schools, by busing if necessary. In hiring, it means that **affirmative action** must be used in the hiring process. Affirmative action refers to laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership. It means that it is not enough that women should simply be free to enter the labor force; they should be given the material necessities (e.g., free daycare) that will help them enter it. On payday, workers' checks should reflect not only the results of competition in the marketplace but of plans designed to ensure that people earn comparable amounts for comparable jobs. Of late, affirmative action has been defended in the name of diversity or multiculturalism—the view that every institution (firm, school, or agency) and every college curriculum should reflect the cultural (i.e., ethnic) diversity of the nation.

## Equality of Opportunity

The second view holds that if it is wrong to discriminate *against* African Americans and women, it is equally wrong to give them preferential treatment over other groups. To do so constitutes **reverse discrimination**. The Constitution and laws should be color-blind and sex-neutral.<sup>56</sup>

In this view, allowing children to attend the school of their choice is sufficient; busing them to attain a certain racial mixture is wrong. Eliminating barriers to job opportunities is right; using numerical “targets” and “goals” to place minorities and women in specific jobs is wrong. If people wish to compete in the market, they should be satisfied with the market verdict concerning the worth of their work.

Each of these views is intertwined with other deep philosophical differences. Supporters of equality of opportunity tend to have orthodox beliefs; they favor letting private groups behave the way that they want (and so may defend the right of a men's club to exclude women). Supporters of the opposite view are likely to be progressive in their beliefs and insist that private clubs meet the same standards as schools or business firms. Adherents to the equality-of-opportunity view often attach great importance to traditional models of the family and so are skeptical of subsidized daycare and federally funded abortions. Adherents to the equality-of-results view prefer greater freedom of choice in lifestyle questions and so take the opposite position on daycare and abortion.

Of course, the debate is more complex than this simple contrast suggests. Take, for example, the question of affirmative action. Both the advocates of equality of opportunity and those of equality of results might agree that there is

something odd about a factory or university that hires no African Americans or women, and both might press it to prove that its hiring policy is fair. Affirmative action in this case can mean *either* looking hard for qualified women and minorities and giving them a fair shot at jobs *or* setting a numerical goal for the number of women and minorities that should be hired and insisting that that goal be met. Persons who defend the second course of action call these goals “targets”; persons who criticize that course call them “quotas.”

The issue has been fought largely in the courts. Between 1978 and 1990, about a dozen major cases involving affirmative-action policies were decided by the Supreme Court; in about half the policies were upheld, and in the other half they were overturned. The different outcomes reflect two things: the differences in the facts of the cases and the arrival on the Court of Justices Kennedy, O'Connor, and Scalia, all three appointed by President Ronald Reagan—who was opposed to (at least) the broader interpretation of affirmative action. As a result of these decisions, the law governing affirmative action is now complex and confusing.

Consider one issue: Should the government be allowed to use a quota system to select workers, enroll students, award contracts, or grant licenses? In the *Bakke* decision in 1978, the Court said the medical school of the University of California at Davis could not use an explicit numerical quota in admitting minority students but could “take race into account.”<sup>57</sup> So no numerical quotas, right?

Wrong. Two years later, the Court upheld a federal rule that set aside 10 percent of all federal construction contracts for minority-owned firms.<sup>58</sup> All right, maybe quotas can't be used in medical schools, but they can be used in the construction industry?

Not exactly. In 1989, the Court overturned a Richmond, Virginia, law that set aside 30 percent of its construction contracts for minority-owned firms.<sup>59</sup> Well, maybe the Court just changed its mind between 1980 and 1989?

No. One year later, it upheld a federal rule that gave preference to minority-owned firms in the awarding of broadcast licenses.<sup>60</sup> Then in 1993, it upheld the right of white contractors to challenge minority set-aside laws in Jacksonville, Florida.<sup>61</sup>

It is too early to try to make sense of these twists and turns, especially since a deeply divided Court is still wrestling with these issues and Congress (as with the civil rights Act of 1991) is modifying or superseding some earlier Court decisions. But a few general standards seem to be emerging. In simplified form, they are as follows:

### **affirmative action**

Laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership.

### **reverse discrimination**

Using race or sex to give preferential treatment to some people.

- The courts will subject any quota system created by state or local governments to “strict scrutiny” and will look for a “compelling” justification for it.
- State or local governments cannot use quotas or preference systems without first showing that such rules are needed to correct an actual past or present pattern of discrimination.<sup>62</sup>
- In proving there has been discrimination, it is not enough to show that African Americans (or other minorities) are statistically underrepresented among employees, contractors, or union members; the actual practices that have had this discriminatory impact must be identified.<sup>63</sup>
- Quotas or preference systems created by *federal* law will be given greater deference, in part because Section 5 of the Fourteenth Amendment gives Congress powers not given to the states to correct the effects of racial discrimination.<sup>64</sup>
- It may be easier to justify in court a voluntary preference system (e.g., one agreed to in a labor-management contract) than one that is required by law.<sup>65</sup>
- Even when you can justify special preferences in *hiring* workers, the Supreme Court is not likely to allow racial preferences to govern who gets *laid off*. A worker laid off to make room for a minority worker loses more than a worker not hired in preference to a minority applicant.<sup>66</sup>

Complex as they are, these rulings still generate a great deal of passion. Supporters of the decisions barring certain affirmative-action plans hail these decisions as steps back from an emerging pattern of reverse discrimination. In contrast, civil rights organizations have denounced those decisions that have overturned affirmative-action programs.

In thinking about these matters, most Americans distinguish between compensatory action and preferential treatment. They define *compensatory action* as “helping disadvantaged people catch up, usually by giving them extra education, training, or services.” A majority of the public supports this. They define preferential treatment as “giving minorities preference in hiring, promotions, college admissions, and contracts.” Large majorities oppose this.<sup>67</sup> These views reflect an enduring element in American political culture—a strong commitment to individualism (“nobody should get something without deserving it”) coupled with support for aiding the disadvantaged (“somebody who is suffering through no fault of his or her own deserves a helping hand”).

Where does affirmative action fit into this culture? Polls suggest that if affirmative action is defined as “helping,” people will support it; if it is defined as “using quotas,” they will oppose it. On this matter, blacks and whites sometimes see things differently. Blacks think they should receive preferences in employment to create a more diverse workforce and to make up for past discrimination; whites oppose using goals to create diversity or to remedy past ills. In sum, the controversy over affirmative action depends in part on what you mean by it and on your racial identity.<sup>68</sup>

A small construction company named Adarand tried to get a contract to build guardrails along a highway in Colorado.

Though it was the low bidder, it lost the contract because of a government policy that favors small businesses owned by “socially and economically disadvantaged individuals”—that is, by racial and ethnic minorities. In a five-to-four decision, the Court agreed with Adarand and sent the case back to Colorado for a new trial.

The essence of the Court’s decision was that *any* discrimination based on race must be subject to strict scrutiny, even if its purpose is to help, not hurt, a racial minority. Strict scrutiny means two things:

- Any racial preference must serve a “compelling government interest.”
- The preference must be “narrowly tailored” to serve that interest.<sup>69</sup>

To serve a compelling governmental interest, it is likely that any racial preference will have to remedy a clear pattern of past discrimination. No such pattern had been shown in Colorado.

This decision prompted a good deal of political debate about affirmative action. In California, an initiative was put on the 1996 ballot to prevent state authorities from using “race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group” in public employment, public education, or public contracting. When the votes were counted, it passed. Michigan, Nebraska, and Washington have adopted similar measures, and other states may do so.

But the *Adarand* case and the passage of the California initiative did not mean affirmative action was dead. Though the federal Court of Appeals for the Fifth Circuit had rejected the affirmative-action program of the University of Texas Law School,<sup>70</sup> the Supreme Court did not take up that case. It waited several more years to rule on a similar matter arising from the University of Michigan. In 2003, the Supreme Court overturned the University of Michigan’s admissions policy that had given to every African American, Hispanic, and Native American applicant a bonus of 20 points out of the 100 needed to guarantee admission to the University’s undergraduate program.<sup>71</sup> This policy was not “narrowly tailored.” In rejecting the bonus system, the Court reaffirmed its decision in the *Bakke* case, made in 1978, in which it had rejected a university using a “fixed quota” or an exact numerical advantage to the exclusion of “individual” considerations.

But that same day, the Court upheld the policy of the University of Michigan Law School that used race as a “plus factor” but not as a numerical quota.<sup>72</sup> It did so even though using race as a plus factor increased by threefold the proportion of minority applicants who were admitted. In short, admitting more minorities serves a “compelling state interest,” and doing so by using race as a plus factor is “narrowly tailored” to achieve that goal. Then in 2006, Michigan voters approved a ballot measure banning the use of race as a consideration in academic admissions, public employment, and government contracting. In 2012, a U.S. Circuit Court struck down the ban, but only in relation to academic admissions; two years later, the U.S. Supreme Court upheld the ban for academic admissions.<sup>73</sup>



## LANDMARK CASES

### Affirmative Action

- ***Regents of the University of California v. Bakke* (1978):** In a confused set of rival opinions, the decisive vote was cast by Justice Powell, who said that a quota-like ban on Bakke's admission was unconstitutional but that "diversity" was a legitimate goal that could be pursued by taking race into account.
- ***United Steelworkers v. Weber* (1979):** Despite the ban on racial classifications in the 1964 Civil Rights Act, this case upheld the use of race in an employment agreement between the steelworkers union and steel plant.
- ***Richmond v. Croson* (1989):** Affirmative-action plans must be judged by the strict scrutiny standard that requires any race-conscious plan to be narrowly tailored to serve a compelling interest.
- ***Grutter v. Bollinger and Gratz v. Bollinger* (2003):** Numerical benefits cannot be used to admit minorities into college, but race can be a "plus factor" in making those decisions.
- ***Parents v. Seattle School District* (2007):** Race cannot be used to decide which students may attend especially popular high schools because this was not "narrowly tailored" to achieve a "compelling" goal.
- ***Schuetz v. Coalition to Defend Affirmative Action* (2014):** Public institutions of higher education may not give preference in admission based on race, sex, color, ethnicity, or national origin.
- ***Fisher v. University of Texas at Austin et al* (2016):** A university may consider race as one of many factors in admissions decisions to create a diverse group of students.

In *Fisher v. University of Texas* (2013), the Court, in a seven-to-one decision, initially sent another affirmative-action case involving college admissions back to the Fifth Circuit Court of Appeals for reconsideration. Invoking the *Bakke* (1978) and *Grutter* (2003) decisions (see Landmark Cases box above), the majority declared that the lower court had failed to apply the strict scrutiny test. But in 2016, the Supreme Court upheld the University of Texas's admissions program (by a 4-3 vote, due to one vacancy and one recusal on the Court), ruling that consideration of race as one of several factors to ensure diversity among students was constitutionally permissible.

## 5-4 Gay Rights

At first, the Supreme Court was willing to let states decide how many rights gay individuals should have. Georgia, for example, passed a law banning sodomy (i.e., any sexual contact involving the sex organs of one person and the mouth or anus of another). In *Bowers v. Hardwick* (1986), the Supreme Court decided, by a five-to-four majority, that there was no reason in the Constitution to prevent a state from having such a law. There was a right to privacy, but it was designed simply to protect "family, marriage, or procreation."<sup>74</sup>

But 10 years later, the Court seemed to take a different position. The voters in Colorado had adopted a state constitutional amendment that made it illegal to pass any law to protect persons based on their "homosexual, lesbian, or bisexual orientation." The law did not penalize gays and lesbians; instead, it said they could not become the object of specific legal protection of the sort that had traditionally been given to racial or ethnic minorities. (Ordinances to give specific protection to homosexuals had been adopted in

some Colorado cities.) The Supreme Court struck down the Colorado constitutional amendment because it violated the equal protection clause of the federal Constitution.<sup>75</sup>

Now we faced a puzzle: a state can pass a law banning homosexual sex, as Georgia did, but a state cannot adopt a rule preventing cities from protecting homosexuals, as Colorado did. The matter was finally put to rest in 2003. In *Lawrence v. Texas*, the Court, again by a five-to-four vote, overturned a Texas law that banned sexual contact between persons of the same sex. The Court repeated the language it had used earlier in cases involving contraception and abortion. If "the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion" into sexual matters. The right of privacy means the "right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." It specifically overruled *Bowers v. Hardwick*.<sup>76</sup>

In 2003, the same year as the *Lawrence* decision, the Massachusetts Supreme Judicial Court decided by a four-to-three vote that gays and lesbians must be allowed to be married in the state.<sup>77</sup> In response, the Massachusetts legislature passed a bill that would amend that state's constitution to ban gay marriage. But that amendment required another ratification vote, which took place in 2007, and the amendment was defeated. In the mid-2000s, while Massachusetts legalized same-sex marriage and officials in other states considered doing the same, 13 states amended their state constitutions to prohibit or restrict it further. State by state, a complicated set of political and legal actions and counteractions had begun.

For instance, in California, the mayor of San Francisco began issuing marriage licenses to hundreds of gay couples. In 2004, the California Supreme Court overturned the





## LANDMARK CASES

### Gay Rights

- **Boy Scouts of America v. Dale (2000):** A private organization may ban gays from its membership.
- **Lawrence v. Texas (2003):** State law may not ban sexual relations between same-sex partners.
- **United States v. Windsor (2013):** Gay couples married in states where same-sex marriage is legal must receive the same federal health, tax, and other benefits that heterosexual married couples receive.
- **Obergefell v. Hodges (2015):** Same-sex couples have a constitutional right to marry.

mayor's decisions. The next year, the state legislature voted to make same-sex marriages legal, but Governor Arnold Schwarzenegger vetoed the bill. In 2008, the state's voters approved a ballot measure, Proposition 8, banning gay marriage. But, in 2010, a federal district judge overturned that vote. After a federal appeals court put the lower federal court's decision on hold, a case concerning Proposition 8 made its way before the U.S. Supreme Court.

In March 2013, the Court heard oral arguments in each of two same-sex marriage cases. In *Hollingsworth v. Perry*, the central issue was the constitutionality of California's Proposition 8: Does the Proposition 8 ban on same-sex marriage violate the Constitution's "equal protection" or other

provisions? In *United States v. Windsor*, the central issue was the constitutionality of the Defense of Marriage Act (DOMA), a 1996 federal law that bars the federal government from recognizing same-sex marriage couples in relation to health, tax, and other benefits that it affords to heterosexual married couples: Does the DOMA violate the Constitution by depriving all persons married legally under the laws of their respective states the same recognition, benefits, and rights, and is same-sex marriage a fundamental right that all states must respect?

In June 2013, the Court issued opinions that in each case were understood widely as victories for same-sex marriage proponents—but that in each case also left the central constitutional questions for another day. In the Proposition 8 case, the Court, by a five-to-four majority, held that the private parties that brought the suit did not have standing to defend the law in federal court after California state officials had declined to do so. The practical effect was to let stand the lower federal court's decision striking down Proposition 8 as unconstitutional, and thereby to overturn the ban on same-sex marriage in California—without, however, affecting laws in other states that prohibit same-sex marriage. In the more significant DOMA case, the Court, by a five-to-four majority, held that the 1996 law was unconstitutional because it deprived gay couples (married in states where same-sex marriage is legal) of the same federal health, tax, and other benefits that heterosexual married couples receive. But the Court stopped far short of declaring that same-sex marriage is a fundamental right that all states must respect. Still, in the months following the Court's decisions on Proposition 8 and the DOMA, new legal challenges to laws banning same-sex marriage were launched in a half-dozen states. In 2015, the Court ruled five to four in *Obergefell v. Hodges* that gay marriage is constitutional.



Justin Sullivan/Getty Images

**IMAGE 5-7** Proposition 8 opponents celebrate the ruling to overturn the proposition, which denied same-sex couples the right to marry in the state of California.

Thus far, the Court has continued to treat sexual orientation cases involving private groups differently from the way it has treated such cases involving government agencies or benefits. The Court has maintained that private groups are free to exclude homosexuals from their membership. For example, in 2000, by a five-to-four vote, the Court decided that the Boy Scouts of America could exclude gay men and boys because that group had a right to determine its own membership.<sup>78</sup> In May 2013, following more than a decade of controversy over the decision and the policy, the Boy Scouts of America made public a plan that would have the organization admit openly gay boys but continue to exclude openly gay men from leadership and membership in the organization. Two years later, though, the organization announced that it would lift this ban.

Overall, such changes reflect not only an evolving understanding of the Constitution and other laws, but also broad shifts in social norms and mores. A generation ago, the American Psychological Association classified homosexuality as a mental disorder (that practice was ended in 1973), and openly gay individuals were extremely rare in most parts of the country. Today, not only are many leading Americans openly gay, but society has become far more accepting of gays and lesbians in nearly all walks of life. As we discuss in Chapter 6, there has been a sea change in public opinion on gay rights, and now many rights for gays and lesbians—including the right to marry—have majority support in the U.S. public. While the Supreme Court does not always respond to public opinion, it does reflect these sorts of broad social shifts in norms and attitudes.

## 5-5 Looking Back—and Ahead

The civil rights movement in the courts and in Congress changed the nature of African American participation in politics profoundly by bringing Southern blacks into the political system so they could become an effective interest group. The decisive move was to enlist Northern opinion in this cause, a job made easier by the Northern perception that civil rights involved simply an unfair contest between two minorities: Southern whites and Southern blacks. That perception changed when it became evident that the court rulings and legislative decisions would apply to the North as well as the South, leading to the emergence of Northern opposition to court-ordered busing and affirmative-action programs.

By the time this reaction developed, the legal and political system had been changed sufficiently to make it difficult—if not impossible—to limit the application of civil rights laws to the special circumstances of the South or to alter by legislative means the decisions of federal courts. Though the courts can accomplish little when they have no political allies (as revealed by the massive resistance to early school-desegregation decisions), they can accomplish a great deal, even in the face of adverse public opinion, when they have some organized allies. The feminist movement has paralleled in organization and tactics many aspects of the black civil rights movement, but with important differences. Women sought to repeal or reverse laws and court rulings that in many cases were designed ostensibly to protect rather than subjugate



## HOW WE COMPARE

### Same-Sex Marriages at Home and Abroad

As of 2015, 20 nations grant legal recognition to same-sex marriages.

#### Country (Year Legalized Gay Marriage)

The Netherlands (2000)  
 Belgium (2003)  
 Canada (2005)  
 Spain (2005)  
 South Africa (2006)  
 Norway (2009)  
 Sweden (2009)  
 Argentina (2010)  
 Iceland (2010)  
 Portugal (2012)  
 Denmark (2012)  
 Brazil (2013)  
 England and Wales (2013)  
 France (2013)  
 New Zealand (2013)  
 Uruguay (2013)  
 Scotland (2014)  
 Luxembourg (2014)  
 Finland (2015)  
 United States (2015)

As of 2015, in one other nation, same-sex marriage is legal in some, but not all, parts of the country:

Mexico (2009)

**Source:** Pew Forum on Religion and Public Life, *Gay Marriage around the World*, December 19, 2013; updated March 9, 2015; Robert Barnes, “Supreme Court Rules Gay Couples Nationwide Have a Right to Marry,” *Washington Post*, June 26, 2015.

them. The conflict between protection and liberation was sufficiently intense to defeat the effort to ratify the Equal Rights Amendment.

Among the most divisive civil rights issues in American politics are abortion and affirmative action. From 1973 to

1989, the Supreme Court seemed committed to giving constitutional protection to all abortions within the first trimester. Since 1989, it has approved various state restrictions on the circumstances under which abortions can be obtained.

There has been a similar shift in the Court's view of affirmative action. Though it will still approve some quota plans, it now insists they pass strict scrutiny to ensure they are used only to correct a proven history of discrimination, they place the burden of proof on the party alleging discrimination,

and they are limited to hiring and not extended to layoffs. Congress has modified some of these rulings with new civil rights legislation.

Finally, while it remains to be seen whether both court doctrines and legislative initiatives on gay rights will follow patterns like those that expanded civil rights protections for African Americans, other minorities, and women, it is clear that the policy dynamics surrounding same-sex marriage are quite different from what they were only a dozen years ago.

## LEARNING OBJECTIVES .....

### 5-1 Explain how Supreme Court rulings and federal legislation have attempted to end racial discrimination in the United States.

After the Supreme Court ruled that school segregation was unconstitutional, Congress and the executive branch debated how they would implement the decision. But in time, these institutions began spending federal money, and using federal troops and law enforcement officials, in ways that greatly increased the rate of integration.

### 5-2 Explain how Supreme Court rulings and federal legislation have attempted to advance women's rights in the United States.

While court rulings and laws state that treating men and women differently in several areas, such as pay and membership in professional organizations, is discrimination, the Supreme Court also says a difference in treatment can be justified constitutionally if the difference is fair, reasonable, and not arbitrary. Sex differences need not meet the "strict scrutiny" test. It is permissible to punish men for statutory rape, to create single-sex public schools (so long as they meet certain requirements), and to draft men without drafting women.

### 5-3 Discuss the evolution of affirmative-action programs after the national government ended racial segregation.

To overcome the effects of past discrimination, many institutions, including businesses, schools, and the federal government, have created programs that aim specifically to increase the number of minorities or women in their organization. The Supreme Court has

upheld affirmative-action programs in some cases, but more recent Court rulings have overturned such programs, or said they may not be necessary in the near future.

### 5-4 Discuss how Court doctrine and public opinion on gay rights have changed in the 21st century.

As late as 1986, the Supreme Court upheld a state law forbidding certain homosexual acts. But, in 2003, the Court struck down state laws banning consensual sexual relations between same-sex partners. In the 2000s, while some states legalized same-sex marriage and other states outlawed it, public opinion shifted in favor of allowing gays and lesbians to marry—rising from 35 percent (a minority) in favor in 2001 to 47 percent (a plurality) in favor in 2012.

In 2013, the Court struck down as unconstitutional the federal Defense of Marriage Act, declaring that the federal government must provide gay couples married in states where same-sex marriage is legal with the same health, tax, and other benefits that heterosexual married couples receive.

In 2015, the Supreme Court ruled that same-sex marriage is constitutional.

### 5-5 Summarize how American political institutions and public opinion have expanded civil rights.

American civil rights have expanded through the joint efforts of political institutions and public opinion. In some areas, public opinion has mobilized the national government to act; in other areas, court rulings and legislation have spurred public reaction.



## TO LEARN MORE .....

Court cases: [www.law.cornell.edu](http://www.law.cornell.edu)

Department of Justice: [www.usdoj.gov](http://www.usdoj.gov)

Martin Luther King, Jr., "I Have A Dream" speech, Lincoln Memorial, Washington, D.C., August 28, 1963:

[www.archives.gov/press/exhibits/dream-speech.pdf](http://www.archives.gov/press/exhibits/dream-speech.pdf)

#### Civil Rights Organizations:

National Association for the Advancement of Colored People: [www.naacp.org](http://www.naacp.org)

National Organization for Women: [www.now.org](http://www.now.org)

National Gay and Lesbian Task Force:  
[www.thetaskforce.org](http://www.thetaskforce.org)

National Council of La Raza: [www.nclr.org](http://www.nclr.org)

National Urban League: <http://nul.iamempowered.com>

American Arab Anti-Discrimination Committee:  
[www.adc.org](http://www.adc.org)

Anti-Defamation League: [www.adl.org](http://www.adl.org)

Branch, Taylor. *Parting the Waters: America in the King Years*. New York: Simon and Schuster, 1988. A vivid account of the civil rights struggle.

Flexner, Eleanor. *Century of Struggle: The Women's Rights Movement in the United States*. Rev. ed. Cambridge, MA: Harvard University Press, 1975. A historical account of the feminist movement and its political strategies.

Foreman, Christopher A. *The African-American Predicament*. Washington, D.C.: Brookings Institution, 1999. Thoughtful essays on problems faced by African Americans today.

Franklin, John Hope. *From Slavery to Freedom*, 5th ed. New York: Knopf, 1980. A survey of black history in the United States.

Friedan, Betty. *The Feminine Mystique*. New York: Norton, 1963. Tenth anniversary edition, 1974. A well-known call for women to become socially and culturally independent.

Kluger, Richard. *Simple Justice*. New York: Random House/Vintage Books, 1977. A detailed and absorbing account of the school-desegregation issue, from the Fourteenth Amendment to the Brown case.

Kull, Andrew. *The Color-Blind Constitution*. Cambridge, MA: Harvard University Press, 1992. A history of efforts, none yet successful, to make the Constitution color-blind.

Mansbridge, Jane J. *Why We Lost the ERA*. Chicago: University of Chicago Press, 1986. An explanation of why the Equal Rights Amendment did not become part of the Constitution.

Thernstrom, Stephan, and Abigail Thernstrom. *America in Black and White*. New York: Simon and Schuster, 1997. Detailed history and portrait of African Americans.

Wilhoit, Francis M. *The Politics of Massive Resistance*. New York: George Braziller, 1973. The methods—and ultimate collapse—of all-out Southern resistance to school desegregation.

Woodward, C. Vann. *The Strange Career of Jim Crow*. New York: Oxford University Press, 1957. A brief, lucid account of the evolution of Jim Crow practices in the South.

A close-up photograph of a hand holding a blue pen, poised to fill out an 'Exit Poll' form. The form has a green header with the words 'Exit Poll' in large, bold, black letters. Below the header, there are several questions with radio button options. Visible questions include 'What is your gender?' with options 'Male' and 'Female', 'What age group?' with options '18-29', '30-44', and '45-59', and 'What income level'. The background is slightly blurred, showing more of the form and the hand.

# Exit Poll

Sergiyev/Shutterstock.com

## CHAPTER 6

# Public Opinion and the Media

### LEARNING OBJECTIVES

- 6-1** Discuss what “public opinion” is and how we measure it.
- 6-2** Outline the major factors that shape public opinion.
- 6-3** Discuss the relationship between public opinion and public policy.
- 6-4** Trace the evolution of the press in America, explaining how media coverage of politics has changed over time.
- 6-5** Summarize the most important sources of news for contemporary Americans.
- 6-6** Explain the main political functions of the media in America, and discuss how the media both enhance and detract from American democracy.
- 6-7** Discuss the reasons behind lower levels of media trust today, and summarize the arguments for and against media bias.
- 6-8** Explain how government controls and regulates the media.

Defined simply, **public opinion** refers to how people think or feel about particular things. In this chapter, we take a close look at what “public opinion” is, how it is formed, and how public opinion influences government policy. The **media** are all public sources of news and information—local newspapers, national political magazines, television news, talk radio, Internet blogs, and many others—that have the potential to influence government and public opinion. While many overstate the media’s impact on public opinion, as we show in this chapter, the media does shape public opinion and influence politics in powerful ways.

Let’s begin our exploration of public opinion and the media by examining how perspectives on the role of public opinion in the country’s representative democracy have changed since the nation was founded.

## THEN

The Founding Fathers believed that most average citizens lacked the time, information, energy, interest, and experience to decide on public policy. The Constitution’s chief architect, James Madison, argued that direct popular participation in the decisions of government was a recipe for disaster, and that “it is the reason, alone, of the public that ought to control and regulate the government.”<sup>1</sup> Madison and the other Framers looked to “the representatives of the people,” most particularly the U.S. Senators who were not elected directly until 1913, “as a defense to the people against their own temporary errors and delusions.”<sup>2</sup>

## NOW

Try to imagine any candidate for the U.S. Senate—or for that matter, any federal, state, or local office—winning election or reelection, or maintaining high public approval ratings after questioning “rule by the people” or doubting the majority’s opinions the way that the Framers did routinely, matter-of-factly, and publicly.

## 6-1 What Is Public Opinion?

Some years ago, researchers at the University of Cincinnati asked 1,200 local residents whether they favored passage of the Monetary Control Bill. About 21 percent said they favored the bill, 25 percent said they opposed it, and the rest said they hadn’t thought much about the matter or didn’t know.

But there was no such thing as the Monetary Control Bill; the researchers had made it up. About 26 percent of the people questioned in a national survey also expressed opinions on the same nonexistent piece of legislation.<sup>3</sup> In many surveys, wide majorities favor expanding most government programs *and* paying less in taxes.<sup>4</sup> On some issues, the majority in favor one month gives way to the majority opposed the next, often with no obvious basis for the shift. This raises an important question: How much confidence should we place in surveys that presumably tell us “what the American people think” about legislation and other issues?

The first major academic studies of public opinion and voting, published in the 1940s, painted a distressing picture

of American democracy. The studies found that, while a small group of citizens knew a lot about government and had definite ideas on many issues, the vast majority knew next to nothing about government and had only vague notions even on much-publicized public policy matters that affected them directly.<sup>5</sup> In the ensuing decades, however, other studies painted a somewhat more reassuring picture. These studies suggested that, while most citizens are poorly informed about government and care little about most public policy issues, they are nonetheless pretty good at using limited information (or cues) to figure out what policies, parties, or candidates most nearly reflect their values or favor their interests, and then acting (or voting) accordingly.<sup>6</sup> We will see in this chapter that while there are important limits to what public opinion can tell us, it is less fickle and transient than it seems at first glance.

## How Do We Measure Public Opinion?

If properly conducted, a survey of public opinion—popularly called a **poll**—can capture the opinions of 300 million citizens by interviewing as few as 1,500 of them. To draw valid conclusions from such a poll, two particular ingredients are needed: a properly drawn sample and carefully worded questions.

Whatever it asks and however it is worded, no poll can provide a reasonably accurate measure of how people think or feel unless the persons polled are a **random sample** of the entire population—meaning that any given voter or adult has an equal chance of being interviewed. Pollsters originally developed these methods to conduct in-person polls. Such polls are extremely expensive and time-intensive to conduct, so pollsters shifted gradually to interviewing respondents by (land-line) telephone. Today, with the decline of land lines and the rise of cell phones, leading polling firms still do some interviews via land lines, but do many via cell phones as well, though the basic idea of random sampling remains the same.

If this process is repeated using equally randomized methods, the pollster might get slightly different results. The difference between the results of two surveys or samples is called **sampling error**. For example, if one random sample shows that 70 percent of all Americans approve of the way the president is handling the job, and another random sample taken at the same time shows that 65 percent do, the sampling error is 5 percent.

### **public opinion**

How people think or feel about particular things.

**media** Sources of news and information that have the potential to influence public opinion.

**poll** A survey of public opinion.

### **random sample**

Method of selecting from a population in which each person has an equal probability of being selected.

**sampling error** The difference between the results of random samples taken at the same time.



## CONSTITUTIONAL CONNECTIONS

### Majority Opinion and Public Policy

For the most part, the Framers of the Constitution thought that public opinion should play only a limited and indirect role in making public policy (see Chapters 1 and 2). They favored representative democracy over direct democracy. They doubted that most people would have the time, energy, interest, information, or expertise to deliberate and decide well on policy matters. They worried that majority opinion often would be fickle, factious, and overly influenced by short-term thinking. Thus, in *Federalist* No. 63, did James Madison reflect on the need to defend “the people against their own temporary errors and delusions” and the “tyranny of their own passions.”

On the other hand, however, the Framers believed that while the opinions held by a temporary or “transient” majority should

carry little weight with elected policymakers, the opinions expressed by a persistent majority—for example, a majority that persists over the staggered terms of House and Senate and over more than a single presidential term—should be heard and, in many (though not in all) cases heeded. When it came to civil liberties and civil rights, Madison and the other Framers were not willing to empower even persistent majorities or subject fundamental freedoms to a popular vote. Still, they believed that, on most public policy issues, a truly representative democratic government would and should enact the policies persistently favored by most people.

**exit polls** Polls based on interviews conducted on election day with randomly selected voters.

**question wording** The way in which survey questions are phrased, which influences how respondents answer them.

When conducted properly, polls are quite accurate, though certainly not infallible. Since 1952, most major polls have in fact picked the winner of the presidential election. Likewise, **exit polls**—interviews with randomly selected voters, conducted at polling places on election day in a representative sample of voting districts—have proven to be quite accurate. While there are occasionally errors in prediction especially in close elections, generally

speaking, polling is typically accurate.

For any population over 500,000, pollsters need to make about 15,000 telephone calls to reach a number of respondents (technically, the number computes to 1,065) sufficient to ensure that the opinions of the sample differ only slightly—by plus or minus 3 percent—from what the results would have been had they interviewed the entire population from which the sample was drawn. That can be very expensive to do. As a result, firms have begun to investigate other methods of conducting polls, such as recruiting volunteers online. Such methods have worked well in some instances, but not in others. Whether such techniques will equal the high quality of standard random sampling remains to be seen.<sup>7</sup>

### How Do We Ask Questions?

The first step to obtaining quality information from a poll is to draw the sample correctly. The second is to ask the questions correctly. Pollsters aim to write their questions clearly and plainly to avoid ambiguity and loaded language. They do so because how they ask the questions determines the answers they get.

Survey researchers spend considerable time worrying about **question wording**—the specific phrases used to describe policies in survey questions. For example, in one canonical study, researchers conducted an experiment. Half of the respondents were asked how much they supported government welfare programs, and half were asked how much they supported government aid to the poor. Researchers expected the two items to give very similar results, as welfare programs are the government’s efforts to aid the poor. However, when they conducted the study, the two items gave very different results, with many more respondents supporting aid to the poor.<sup>8</sup> When researchers did a follow-up study to investigate this discrepancy, they found a surprising result: while researchers see welfare and aid to the poor as the same thing, respondents did not. For respondents, government welfare programs meant policies such as food stamps or public housing. But aid to the poor included not only those items, but other policies such as homeless shelters, soup kitchens, and food banks. Respondents viewed these latter programs more positively, and hence were more supportive of aid to the poor.<sup>9</sup> By equating welfare and aid to the poor, researchers had set up a misleading comparison. To actually understand where the public stands on this or any other issue, we need to avoid asking questions that oversimplify difficult policy issues.

At this point, you might be thinking that we can never trust public opinion data, but that fear is unwarranted. Public opinion data can offer very valuable insights into what the public wants from its leaders and its government, but to do that the survey must be conducted with care. When you see a poll reported in the news, scrutinize the questions carefully, and look for particular wordings that could affect the results. Look for other high-quality polls conducted around the same time, and see if they offer similar results. If you find multiple polls, using different well-worded questions that yield similar results, then you have found something you can trust.



In contrast, if there is just one poll, with an oddly worded question, that shows support for a particular policy, then you should be more skeptical of that result.

## 6-2 What Drives Opinion?

To understand public opinion and how it shapes government policy, we need to understand why it differs across individuals. What factors make people hold different attitudes and beliefs? A complete answer to that question is beyond the scope of this book (and is not really even knowable), but political scientists focus on three main factors that shape attitudes: political socialization and the family, demographic factors, and individuals' partisanship and ideology. While these are not the only factors that explain why people believe what they do (e.g., the media also matter, as we discuss later in the chapter), they are among the most important.

### Political Socialization and the Family

For a long time, scholars have known that people acquire their political views from their families. The great majority of high school students know the party affiliation of their parents, and only a tiny minority of children supports a party opposite that of their parents.<sup>10</sup> Likewise, children's views on the issues tend to be broadly similar to those of their parents. It is not that children adopt the views of their parents automatically, but just as parents influence a child's religion or general outlook on life, they influence a child's political views as well. We refer to this process as **political socialization**. A child's first experience with politics is in the home, and so it should not be surprising that the parents' views shape the child's views.

This happens via two mechanisms. First, there is some evidence that some political attitudes can be passed genetically from parents to child, just like height or eye color.<sup>11</sup> We should note that while some political scientists accept this evidence, others dispute it.<sup>12</sup> The fairest thing to say is that there is suggestive evidence for the genetic transmission of political traits, but more work is needed to establish it definitively. Second, and much less controversially, scholars argue that children learn from the political cues provided by their parents. If the parents sit around the dinner table—or the evening television—and discuss politics and global affairs, the children learn where their parents stand on the issues of the day (and where the children think they themselves should stand). Such effects are especially pronounced in highly politicized families where politics is a more frequent topic of conversation.<sup>13</sup>

Of course, to say that parents and the family greatly shape one's political outlook is not to say that they determine it completely. The political environment in which they come of age also influences children's attitudes heavily. Political scientists call this the **impressionable years hypothesis**: Young people's political attitudes are influenced very strongly by what happens during their formative years (roughly their mid-teens through their mid-20s, when they are in high school and college).<sup>14</sup> For most people, this period is the first time they really notice politics, and these initial events shape



**IMAGE 6-1** A family watches a speech by former Senator Rick Santorum (R-PA) during the 2012 South Carolina primary. Exposure to politics as a young person has a strong effect on one's political attitudes.

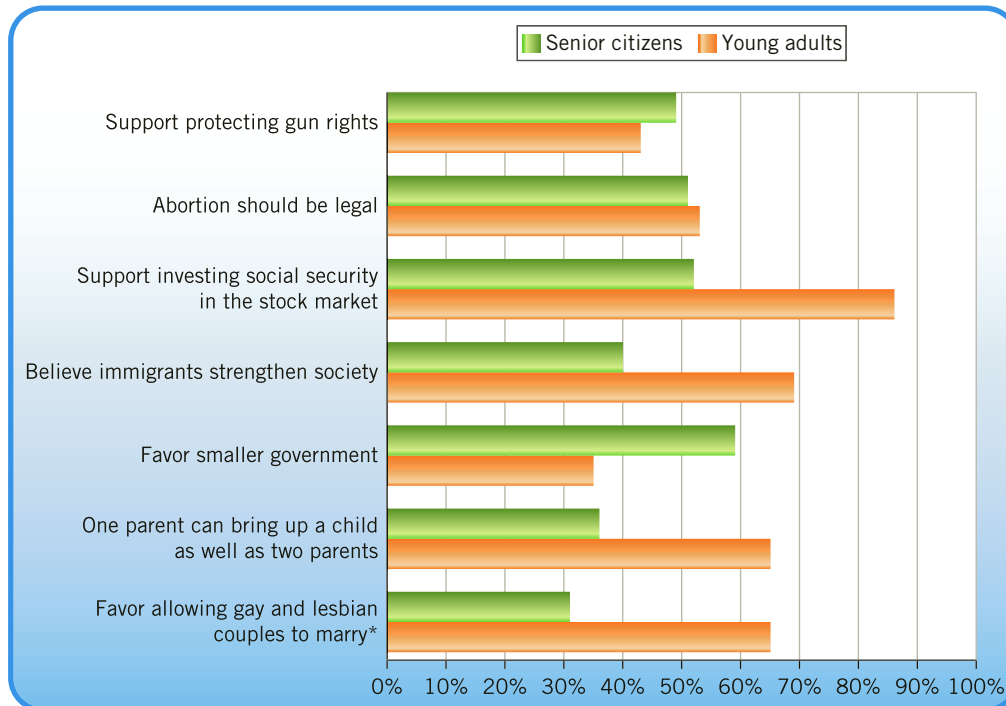
how they see the political world. Those who came of age in the 1960s—during the Civil Rights movement, the protests against the Vietnam War, and student unrest—saw the political world fundamentally differently from their parents, who came of age during the years immediately after World War II. Likewise, today's students, who do not remember a pre-9/11 world, see the political world differently from their parents (who came of age during the end of the Cold War). Early experiences shape political attitudes and persist throughout the life cycle.

This helps us understand that it is not the case that young people are more liberal and older people are more conservative. Compared to older Americans, for example, citizens aged 18 to 29 are more likely to favor gay marriage and to support a stronger safety net (the liberal view), but also more likely to favor letting people invest some of their Social Security contribution in the stock market (the conservative view). Furthermore, on other salient issues, such as abortion and gun control, differences are nonexistent to very slight. As we see in Figure 6-1, the reality of age differences in opinion is more complex than many suppose.

The largest gaps between younger and older voters come from their different attitudes toward government's regulation of appropriate behavior. Such differences stem from broad changes in society. For example, when today's senior citizens were growing up, family structures were more traditional: there were two parents, the man worked, and the woman stayed home. Different arrangements—single parents, divorce, and so forth—were stigmatized. As a result, these older voters are more likely to favor traditional gender

**political socialization** Process by which background traits influence one's political views.

**impressionable years hypothesis** Argument that political experiences during the late teens and early 20s powerfully shape attitudes for the rest of the life cycle.

**FIGURE 6-1** Opinion Gaps Between Young Adults and Senior Citizens

**Source:** Pew Research Center, “The Generation Gap and the 2012 Election,” November 2011;\* From Pew Research Center, “Partisan Polarization Surges in Bush, Obama Years: Trends in American Values, 1987–2012,” June 2012.

### gender gap

Difference in political views between men and women.

roles and family structures.<sup>15</sup> Even more strikingly, a generation ago, homosexuality was criminalized and seen as a mental disorder. But today, it is broadly accepted and part of society. It should not be terribly surprising, then, to learn that support for gay rights, especially same-sex marriage, is markedly higher among younger voters (see Figure 6-1). Both of these examples highlight the importance of the impressionable years and socialization: Because today’s teens and seniors grew up in vastly different environments, they have vastly different attitudes.

## Demographic Factors

The family, however, is not the only factor that shapes why we believe what we believe. Our demographic traits—our race and ethnicity, gender, age, social class/ income, religion, and so forth—also shape and influence our political attitudes significantly. While there are many different demographic factors that shape political attitudes, here we consider only a few of the most salient in the interest of space: gender and race and ethnicity. Together, these demographic factors highlight how who we are what we believe.

### The Gender Gap

Journalists often point out that women have “deserted” Republican candidates to favor Democratic ones. In some cases, this is true. But it would be equally correct to say that

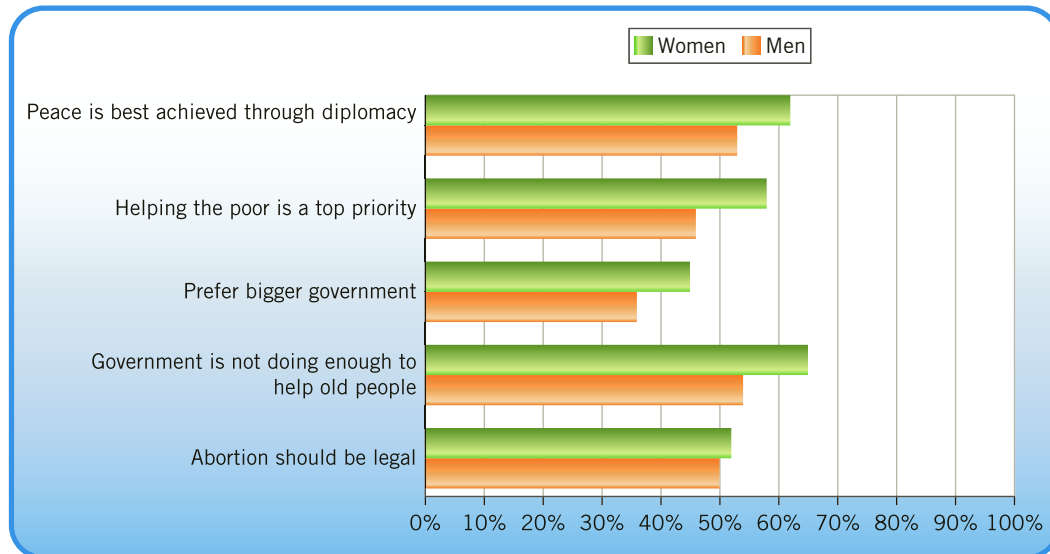
men have “deserted” Democratic candidates for Republican ones. The **gender gap** is the difference in political views between men and women. As we see in Chapters 7 and 8, women are more likely than men to identify as Democrats and to vote for Democratic candidates.

Differences between men and women over prominent political issues and which issues matter most are behind the gender gap in partisan self-identification and voting. Many assumed initially that abortion drove the gender gap, but this turns out to be incorrect. On average, consistently there have been only very modest differences between men and women on abortion over time. Instead, two other factors drive the gender gap: women hold more liberal social welfare and foreign policy attitudes than men, and they are more likely to see social welfare issues as more important.<sup>16</sup> Women are more likely than men to favor activist government, universal health care, environmental protection regulations, antipoverty programs, and laws supporting same-sex marriage, and less likely than men to favor cutting taxes at the expense of social services or to support military interventions. Figure 6-2 shows these trends graphically.

### Race and Ethnicity

Perhaps the most striking political difference between African Americans and whites is that African Americans are overwhelmingly Democratic, and have been so since the Civil Rights movement in the 1960s; we return to this point more in Chapters 7 and 8.<sup>17</sup>

Blacks and whites hold many similar political attitudes. Both blacks and whites want our courts to be tougher in

**FIGURE 6-2** The Gender Gap in Public Opinion

**Source:** Pew Research Center, “The Gender Gap: Three Decades Old, As Wide As Ever,” March 2012.

handling criminals, oppose the idea of making abortion legal in all cases, agree that government is typically wasteful, and think that everyone has it in his or her own power to succeed.<sup>18</sup> Similarly, African Americans and whites both strongly agree that blacks and whites can get along in America.<sup>19</sup>

There are, however, sharp differences between white and black attitudes on other public policy questions, as we see in Figure 6-3. For example, blacks are much more likely than whites to support affirmative action or to oppose the use of military force. African Americans are also, generally speaking, more supportive of efforts to help the poor and disadvantaged. But perhaps the largest black-white opinion gap concerns attitudes toward the criminal justice system. African Americans are much more likely to think that the criminal justice system is unfair and is biased against minorities.

Why are African Americans so much more negative toward the justice system? Much of the answer stems from

their differential experiences with the criminal justice system. African Americans are more likely to have had negative interactions with the criminal justice system, as have their African American friends and family.<sup>20</sup>

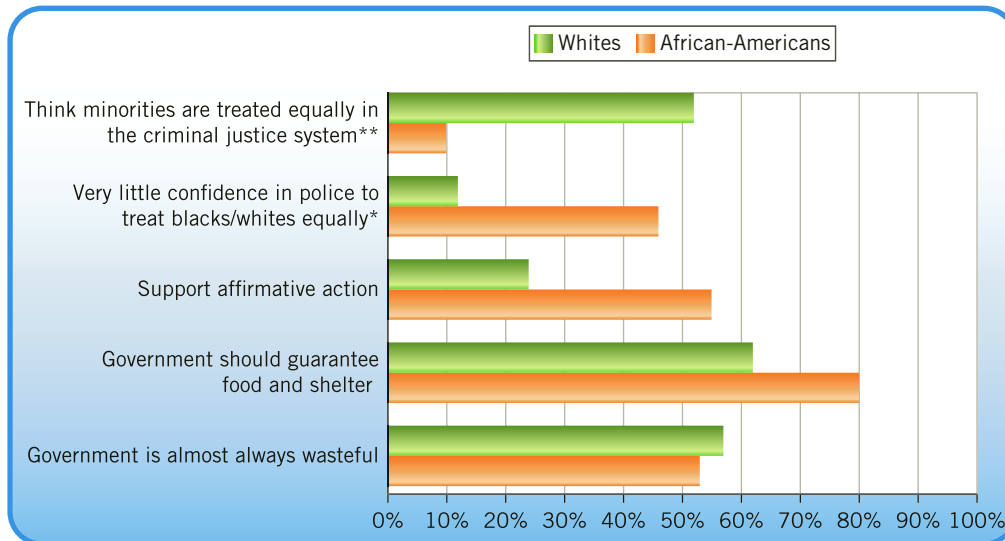
The fact that numerous African Americans have been killed by police or died in police custody in recent years—such as Michael Brown, Freddie Grey, Tamir Rice, Sandra Bland and numerous others—has brought this issue to the forefront of national discussions. These deaths helped to spark the Black Lives Matter movement, and have led to numerous calls for reforms to policing and the criminal justice system. Partially as a result of this increased attention to issues of race, a larger number of white respondents today say that racism is a big problem in American society. It is true that African-Americans are much more likely to identify racism as a serious problem than whites are (73 percent versus 44 percent). But the percentage of whites saying racism is a big problem in American society has increased 17 percentage points since 2010.<sup>21</sup> This underlines an important truth about public opinion: it is dynamic, and changes in response to changes in society.

Contemporary America, however, is not limited simply to African Americans and whites but contains a multitude of ethnic groups from around the world. Most notably, Latinos are now the largest minority group in America, numbering more than 50 million people. While research on Latino public opinion is still in its infancy, today there is a growing body of research exploring how Latinos differ—and how they do not—from other Americans.

At the outset, we note that it is difficult to speak of “Latino” public opinion. With 50 million Latinos coming from a diverse array of countries throughout Central and South America, one cannot say that all Latinos share a particular point of view. That said, some broad patterns do emerge. On issues that speak most directly to the concerns and



**IMAGE 6-2** The Black Lives Matter movement has highlighted issues of racial equality in recent years.

**FIGURE 6-3** Public Opinion in Black and White

**Source:** Pew Research Center, “The Black and White of Public Opinion,” October 2005. \* From Pew Research Center, “Ferguson Highlights Deep Divisions Between Blacks and Whites in America,” November 2014. \*\* From Dan Balz and Scott Clement, “On Racial Issues, American Is Divided Both Black and White and Red and Blue,” *Washington Post*, December 27, 2014.

### partisanship

An individual's identification with a party; whether they consider themselves a Democrat, Republican, or Independent.

other issues, such as jobs, education, and foreign policy, Latinos' views look very similar to other Americans, as we see in Figure 6-4. There are also important generational differences; the views of Latinos who were born in the United States are more similar to other Americans than those who immigrated here from other nations.<sup>22</sup>

experiences of Latinos—such as immigration reform or bilingual education—Latinos' attitudes are markedly different from other Americans. They are also more likely to support efforts to help the less well off, such as raising the minimum wage. But on a wide range of

## The Limits of Demographics

As we have seen throughout this section, various groups in America hold different opinions—blacks differ from whites, women from men, and so forth. But such patterns are, at best, averages, and do not describe everyone. Plumbers and professors may have similar incomes, but they rarely have similar views, and businesspeople in New York City often take a very different view of government than businesspeople in Houston or Birmingham. Your best friend may be a conservative African American Republican, or your wealthy neighbor may be far to the left on economic issues. In short, knowing someone's demographics gives us a good guess as to their views on the issues, but it is just that: a good guess. To really understand their views, we need to know more than just their demographic attributes.

## Political Partisanship and Ideology

After familial socialization, the largest influence on what citizens believe is their political partisanship and their ideological beliefs. When we talk about **partisanship** or partisan identity, we mean people's attachment to their political party: Do they think of themselves as a Democrat or a Republican? We address partisanship in more detail in Chapter 7, but here, we consider its influence on citizens' attitudes.

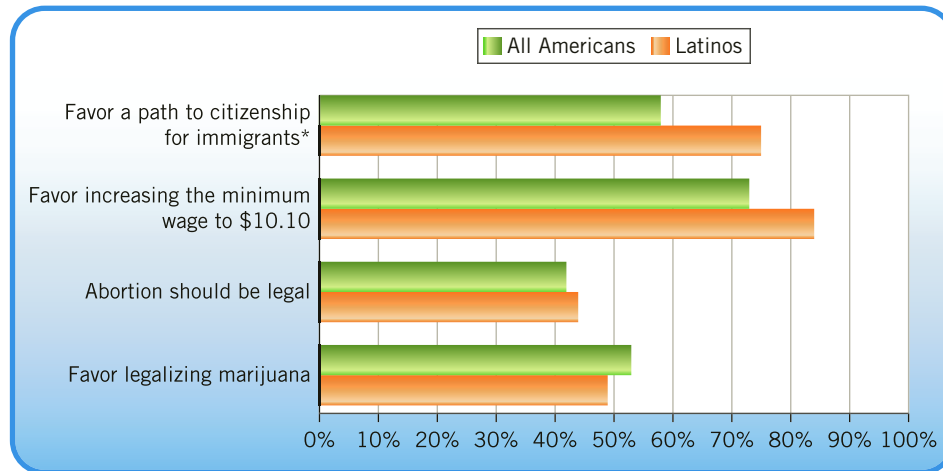
Simply put, partisanship has a powerful, even fundamental, influence on citizens' attitudes. On issue after issue—taxes, spending on social programs, gun control, and many others—Democrats and Republicans have different opinions. Identifying with a party powerfully shapes an individual's beliefs.<sup>23</sup>

Such differences between ordinary Democrats and Republicans are driven by differences among elected officials. Ordinary Democrats and Republicans look to Democratic



**IMAGE 6-3** Marco Rubio, the Hispanic son of exiles from Cuba, is a Republican elected by Florida to the United States Senate in 2010.



**FIGURE 6-4** Latino Public Opinion

**Source:** Pew Research Center, “Latino Voters and the 2014 Midterm Elections: Geography, Close Races and Views of Social Issues,” October 2014. \* From Latino Decisions, “Latino Voter Attitudes Towards Immigration Reform Policy,” January 2013.

and Republican officials to know where to stand on the issues.<sup>24</sup> When people watch a media report about a political issue, the media typically use elected officials from the parties to represent the various positions,<sup>25</sup> meaning that the political parties define the competing perspectives on the issues for most people. Because Democratic and Republican elected officials diverge on these issues, so do ordinary voters (though the differences between ordinary voters are much more muted, as we will see).

This is not just blind obedience. Rather, it reflects that people identify with a party because it shares their values, and as a result, they will follow the lead of their party’s officials. So if you are a Democrat, you might look to, say, Elizabeth Warren or President Obama to see where they stand on the issue, and follow suit. Likewise, a Republican might do the same with Marco Rubio or Paul Ryan. The attitudes of ordinary Democrats and Republicans reflect the opinions of elite Democrats and Republicans.

If ordinary Americans’ attitudes reflect the attitudes of political elites, then this raises an important question: Are ordinary voters now polarized? Over the past 50 years or so, elected Democrats and Republicans (especially in Congress) have become much more sharply divided, as we will see in Chapter 9.<sup>26</sup> The same is not true, however, of ordinary Americans. The most careful analysis done of the attitudes of ordinary Democrats and Republicans is that they are relatively moderate on most issues.<sup>27</sup> Elites may be polarized, but ordinary voters are not.

But how can this be? How is the mass public not polarized if ordinary Americans’ attitudes reflect those of elites—and elites are polarized? The answer is that ordinary voters have sorted, but they have not split.<sup>28</sup> **Party sorting** is the process of aligning issue positions and party. So today, unlike 40 years ago, ordinary Democrats tend to take the liberal position on the issues, and ordinary Republicans the conservative one. For example, according to data from the Pew Research Center, in 1994 only 30 percent of Democrats took positions that were (on average) liberal, but by 2014, that had jumped to 56 percent. The corresponding figures for Republicans taking positions that were conservative are 45 percent and 53 percent.<sup>29</sup> Over time, voters’ views on the issues have become more consistent with their partisanship, as we see Figure 6-5.

While Americans have sorted, they have not gone all the way to the ideological poles. As the numbers from Pew make clear, there is still a great deal of heterogeneity in the mass public: Nearly half of each party takes positions that are centrist or on the opposite ideological side from their party. Likewise, in that same study, 39 percent of Americans take

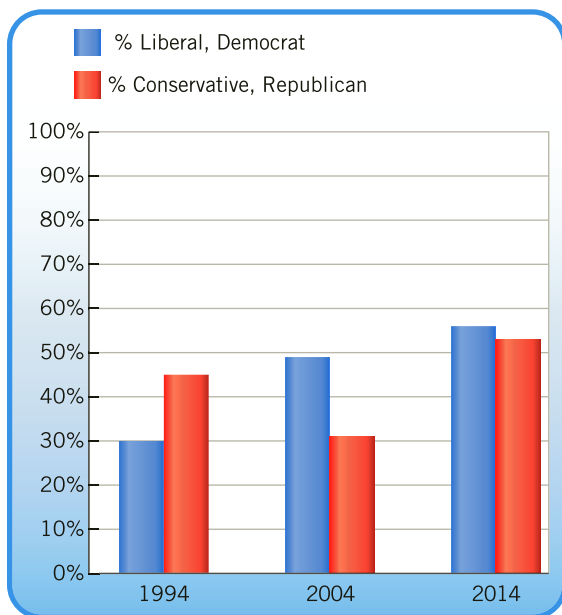
### party sorting

The alignment of partisanship and issue positions so that Democrats tend to take more liberal positions and Republicans tend to take more conservative ones.



AP Images/Rick Bowmer

**IMAGE 6-4** Mia Love (R-UT) meets with voters during the 2014 campaign.

**FIGURE 6-5** Growing Ideological Consistency, 1994–2014

**Source:** Pew Research Center, “Political Polarization in the American Public,” June 2014.

**political ideology** A more or less consistent set of beliefs about what policies government ought to pursue.

views that are best described as centrist. Sorted, rather than polarized, best describes ordinary Americans.

But logically one might ask: If sorting continues, will ordinary Americans come to be deeply polarized? It certainly is possible: If everyone sorted, then the country would certainly be more polarized. However, such a situation is unlikely. While people now take more consistent positions on the issues (i.e., Democrats are on the left, Republicans are on the right), they are largely just to the left or right of the center. They are “slightly liberal” or “slightly conservative” more than “very liberal” or “very conservative.”<sup>30</sup> Furthermore, most Americans are not terribly well informed about politics, nor are they especially interested in it. Given this, it is unlikely that they will adopt the sort of extreme positions that would be required to generate extensive mass polarization. Sorting does increase mass polarization, but only very slightly. We can say the electorate has become quite a bit better sorted, but not really very polarized.

While ordinary voters have not polarized, the same is not true for those who are most active in politics. Among those who are active politically and participate in campaigns, polarization is a more accurate description of what has happened.<sup>31</sup> They have moved to the extremes, and as we see in later chapters, this has important consequences for elected officials.

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## Political Ideology

Partisanship is not the only core fundamental identity that shapes public opinion; so does one’s ideology, whether one

is a liberal or a conservative. Up to now the words *liberal* and *conservative* have been used as though everyone agrees on what they mean and as if they accurately describe general sets of political beliefs held by large segments of the population. Neither of these assumptions is correct. Like many useful words—*love*, *justice*, *happiness*—they are as vague as they are indispensable.

When we refer to people as liberals, conservatives, socialists, or radicals, we are implying that they have a patterned set of beliefs about how government and other important institutions operate and how they ought to operate, and in particular about what kinds of policies government ought to pursue. These groups are said to display to some degree a **political ideology**—that is, a more or less consistent set of beliefs about what policies government ought to pursue.

Political scientists measure the extent to which people have a political ideology in two ways. The first is by seeing how frequently people use broad political categories—“liberal,” “conservative,” “radical”—to describe their own views. This second method involves a simple mathematical procedure: measuring how accurately one can predict a person’s view on a subject at one time based on his or her view on that subject at an earlier time; or measuring how accurately one can predict a person’s view on one issue based on his or her view on a different issue. The higher the accuracy of such predictions or correlations, the more we say a person’s political opinions display “constraint” or ideology.

Looking at the first method (can Americans identify themselves as liberal, moderate, or conservative), it seems like many Americans can select an ideological orientation for themselves. For example, in 2012, 22 percent identified as liberals, 36 percent identified as conservatives, and 37 percent identified as moderates; those patterns have been roughly stable for over a decade.<sup>32</sup> Yet that simple question belies a host of complexity. When we dig slightly deeper, we find that many people adopt those labels without having much of an understanding of what they mean. When given an option to say they “don’t know” which label best describes them, many Americans choose that option—indeed, it is often the plurality response.

Furthermore, many people’s views on the issues (what they think of taxes and spending, gun control, abortion, and so forth) are only weakly correlated with the label (liberal, conservative, or moderate) that they use to describe themselves.<sup>33</sup> Ordinary Americans know where they stand on the issues, but they do not necessarily deeply comprehend the ideological labels used in politics. Except when asked by pollsters, most Americans do not actually employ the words *liberal*, *conservative*, or *moderate* in explaining or justifying their preferences for parties, candidates, or policies, and not many more than half can give plausible definitions of these terms.

What about the second method of measuring ideology? Here, the evidence is—as it has been for 50 years—that most Americans are not deeply ideological. Most people’s views are not aligned tightly into neat liberal or conservative bundles, unlike elites. The vast majority of Americans simply do not think about politics in an ideological or very coherent manner. Ideology is more for elites than for ordinary voters.

## 6-3 Public Opinion and Public Policy

So far, we have delved into the origins and measurement of public opinion. But we have not said anything about the consequences of public opinion: Does public opinion matter? In particular, does public opinion shape public policy?

Happily, the answer to that question is yes, at least most of the time. An encyclopedic study looked at every law where there were relevant public opinion polls over several decades. It found that when public opinion changed, policy change usually followed. Furthermore, such changes were almost always congruent changes: When opinion became more liberal (conservative), the policy itself moved to the left (right). This was especially true for more salient policies, or for particularly large shifts in opinion.<sup>34</sup> This seems to be a “good” outcome for democratic theory: Government decisions do, in fact, reflect the will of the people.

But as we suggested at the outset of the chapter, policies do not always follow the majority’s will. Sometimes, to understand why, we need to understand the role of parties, interest groups, the media, and political institutions, as we see in later chapters. But sometimes, policy does not reflect majority will because the minority is more politically powerful.

This occurs typically because the minority is more politically engaged and active, and pressures politicians accordingly. Gun control is perhaps the best-known example of this situation. Surveys consistently show that a majority of Americans favors gun control. However, among the minority who oppose action, the issue is a much higher priority. For example, gun-control opponents weigh the issue more heavily when choosing a candidate, and were more likely to have given money to relevant interest groups.<sup>35</sup> A study of the members of the leading antigun control organization, the National Rifle Association, found that they were more politically engaged and active than other Americans—and more so than gun-control proponents.<sup>36</sup> In this setting, politicians will respond to the better-organized minority rather than the apathetic majority.

Another example (and a deeply troubling one) is that several studies have shown government policy is often more responsive to the preferences of the economic elite than to the views of other citizens.<sup>37</sup> Those at the top of the economic ladder are more likely to participate in politics<sup>38</sup> and as a result, these studies suggest, politicians heed their views more fully. Given that the economic elite have divergent preferences on some issues, notably, issues of regulation, taxes, and so forth<sup>39</sup> this inequality in responsiveness has real consequences, something we explore in later chapters.

## 6-4 The Media and Politics

Lurking behind much of our discussion about public opinion is the mass media. For example, we discussed how many people use the positions advocated by political elites to know where they should stand on the issues. But where do people get this information? From the media.

No part of the media better exemplifies both its promise and its peril as a tool for democracy than the Internet. The Internet is an important new venue for politics, but it presents challenges for politicians similar to earlier technological advances in communication. From the beginning of the Republic, public officials have tried to get the media on their side while knowing that, because the media love controversy, they are as likely to attack as to praise. The Internet may strike some politicians as the solution to this problem: They think that if they put their own Web pages out there, they can reach the voters directly. They can, but so can rival politicians with their own Web pages.

All of this takes place in a country so committed to a free press that there is little the government can do to control the process. While there have been efforts to control radio and television stations at some points in the past (due to the federal government’s role in licensing broadcasters), most of these attempts have evaporated.

Even strongly democratic nations restrict the press more than the United States. For example, the laws governing libel are much stricter in the United Kingdom than in the United States. As a result, it is easier in the United Kingdom for politicians to sue newspapers for publishing articles that defame or ridicule them. In this country, the libel laws make it almost impossible to prevent press criticisms of public figures. Moreover, England has an Official Secrets Act that can be used to punish any past or present public officials who leak information to the press.<sup>40</sup> In this country, leaking information occurs all the time, and our Freedom of Information Act makes it relatively easy for the press to extract documents from the government.

European governments can be much tougher on people who make controversial statements than the American political system. In 2006, an Austrian court sentenced a man to three years in prison for having denied that the Nazi death camp at Auschwitz killed its inmates. A French court convicted a distinguished American historian for telling a French newspaper that the slaughter of Armenians may not have been the result of planned effort. An Italian journalist stood trial for having written things “offensive to Islam.” In this country, such statements would be protected by the Constitution even if, as with the man who denied the existence of the Holocaust, they were profoundly wrong.<sup>41</sup>

America has a long tradition of privately owned media. By contrast, private ownership of television has come only recently to other nations, such as France. And the Internet is not owned by anybody; here and in many nations, people can say or read whatever they want on their computers. Newspapers in this country require no government permission to operate, but radio and television stations need licenses granted by the Federal Communications Commission (FCC). These licenses must be renewed periodically. On occasion, the White House has made efforts to use license renewals as a way of influencing station owners who were out of political favor, but of late the level of FCC control over what is broadcast has lessened.

There are two potential limits to the freedom of privately owned newspapers and broadcast stations. First, they must make a profit. Some critics believe the need for profit will lead



## HOW WE COMPARE

### Freedom of the Press

The Antifederalists insisted on adding a Bill of Rights to the Constitution because they feared government intrusion into citizens' lives. Their first concern, as reflected in the First Amendment, was to protect speech and expression, which includes freedom of the press. Although the protection is not absolute—the Supreme Court has ruled that there are times when the government may restrict that freedom for national security, for example—the burden of proof is on the government to demonstrate when imposing a restriction is constitutionally necessary.

Not all advanced industrialized democracies provide such broad protection for the media. In the United Kingdom, for example, libel laws are stricter than in the United States, which is why celebrities and business sometimes seek restitution in the former over the latter. Some European democracies have prohibitions on hate speech, which the United States does not (though the United States does impose restrictions on other types of speech that can appear in media outlets, such as obscenity or threats of violence). According to a recent report by Freedom House, an organization that tracks various measurements of freedom cross-nationally, access to free and independent media has declined worldwide. Of 197 countries and territories for which Freedom House evaluated media coverage in 2013, 63 (32 percent) were rated Free, 68 (35 percent) were rated Partly Free, and 66 (33 percent) were rated Not Free.

#### Countries at Top of Global Press Freedom Rankings, Freedom House, 2012

1. Norway, Sweden, and the Netherlands (tied for first place)
2. Belgium and Finland (tied for next ranking) (The United States is tied for 30th place.)

#### Countries at Bottom of global Press Freedom rankings, Freedom house, 2012

1. North Korea (lowest press freedom)
2. Turkmenistan and Uzbekistan (tied for 195th place)
3. Eritrea
4. Belarus

**Source:** Freedom House, "Freedom of the Press 2014."

media outlets to distort the news in order to satisfy advertisers or to build an audience. Though there is some truth to this argument, it is too simple. Every media outlet must satisfy a variety of people—advertisers, subscribers, listeners, reporters, and editors—and balancing those demands is complicated, and will be done differently by different owners.

The second limit is media bias. If most of the reporters and editors have similar views about politics and if they act on those views, then the media will give us only one side of many stories. Later in this chapter, we take a close look at whether the media are actually biased.

## Journalism in American Political History

Important changes in the nature of American politics have gone hand in hand with major changes in the organization and technology of the press. It is the nature of politics, essentially a form of communication, to respond to changes in how communications are carried on. This can be seen by considering five important periods in journalistic history.

### The Party Press

In the early years of the Republic, politicians of various factions and parties created, sponsored, and controlled newspapers to further their interests. This was possible because circulation was small by necessity (newspapers could not be distributed easily to large audiences, owing to poor transportation) and newspapers were expensive (the type was set by hand and the presses printed copies slowly). Furthermore, there were few large advertisers to pay the bills. These newspapers circulated chiefly among the political and commercial elites who could afford the high subscription prices. Even with high prices, the newspapers often required subsidies that came frequently from the government or a political party.

During the Washington administration, the Federalists, led by Alexander Hamilton, created the *Gazette of the United States*. The Republicans, led by Thomas Jefferson, retaliated by creating the *National Gazette*—and made its editor, Philip Freneau, "clerk for foreign languages" in the State Department at \$250 a year (more than \$6,000 in today's dollars) to help support him. After Jefferson became president, he induced another publisher, Samuel Harrison Smith, to start the *National Intelligencer*, subsidizing him with a contract to print government documents. When Andrew Jackson became president, he aided in the creation of *The Washington Globe*. By some estimates, there were more than 50 journalists on the government payroll during this era. Naturally, these newspapers were relentlessly partisan in their views. Citizens could choose among different party papers, but only rarely could they find a paper that presented both sides of an issue.

### The Popular Press

Changes in society and technology made possible the rise of a self-supporting, mass-readership daily newspaper. The development of the high-speed rotary press enabled publishers to print thousands of copies of a newspaper cheaply and quickly. The invention of the telegraph in the 1840s meant that news from Washington could be flashed almost immediately to New York, Boston, Philadelphia, and Charleston, thus providing local papers with access to information that once only the Washington papers enjoyed. The creation in 1848 of the Associated Press allowed telegraphic dissemination of information to newspaper editors on a systematic basis. Since the AP provided stories that had to be brief and that went to newspapers of every political hue, it could not afford to be partisan or biased; to attract as many subscribers as possible, it had to present the facts objectively.

Meanwhile, the nation was becoming more urbanized, with large numbers of people brought together in densely settled areas. These people could support a daily newspaper by



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## THIS WEEK'S ENERGY UNICORN




The belief that we can power the world with unicorn flop sweat, Obama's incandescent speeches, refined banana peels, etc runs deep. I call it "energy romanticism," and like all other kinds of romanticism it is hard to shake, even with things called facts, which are always inconvenient to the dreams of world-saving liberals. Typical is the story last year about how we could put solar panels on roads, a really »

13 RESPONSES READ MORE...

MAY 21, 2015—JOHN HINDERAKER


## DELUSIONAL WHITE HOUSE CALLS ISIS STRATEGY "A SUCCESS"



As I wrote on Monday, the administration's policies on the Middle East are in a state of collapse. This is partly—but only partly—

MAY 21, 2015—PAUL MIRENGOFF

## MORE EVIDENCE, VIA "SID VICIOUS," OF HILLARY'S BENGHAZI DECEIT



Some of the information Sidney Blumenthal supplied to Hillary Clinton about Libya is said to have been flawed. But "Sid

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- ▷ Democrats: White Males Need Not Apply
- ▷ Is Hillary's Glass Jaw Starting to Crack Already?

Courtesy of Power Line Blog

IMAGE 6-5 Blogs, both conservative and liberal, have become an important form of political communication.

paying only a penny per copy and by patronizing merchants who advertised in its pages. Newspapers no longer needed political patronage to prosper, and soon such subsidies began to dry up. In 1860, the Government Printing Office was established, thereby putting an end to most of the printing contracts that Washington newspapers had once enjoyed.

The mass-readership newspaper was scarcely non-partisan, but the partisanship it displayed arose from the convictions of its publishers and editors rather than from the influence of its party sponsors. And these convictions blended political beliefs with economic interest. The way to attract a large readership was with sensationalism: violence, romance, and patriotism, coupled with exposés of government, politics, business, and society. As practiced by Joseph Pulitzer and William Randolph Hearst, founders of large newspaper empires, this editorial policy had great appeal for the average citizen and especially for the immigrants flooding into the large cities.

Strong-willed publishers often could become powerful political forces. Hearst used his papers to agitate for war with Spain when the Cubans rebelled against Spanish rule. Conservative Republican political leaders were opposed to the war, but a steady diet of newspaper stories about real and imagined Spanish brutalities whipped up public opinion in favor of intervention. At one point, Hearst sent noted artist Frederic Remington to Cuba to supply paintings of the conflict. Remington cabled back: “Everything is quiet. . . . There will be no war.” Hearst supposedly replied: “Please remain. You furnish the pictures and I’ll furnish the war.”<sup>42</sup> When the battleship USS *Maine* blew up in Havana harbor, President William McKinley felt helpless to resist popular pressure, and war was declared in 1898.

For all their excesses, the mass-readership newspapers began to create a common national culture, establish the feasibility of a press free of government control or subsidy, and demonstrate how exciting (and profitable) the criticism of public policy and the revelation of public scandal could be.

## Magazines of Opinion

The growing middle class often was repelled by what it called “yellow journalism,” and around the turn of the century was developing a taste for political reform and a belief in the

doctrines of the progressive movement. To satisfy this market, a variety of national magazines appeared that—unlike those devoted to manners and literature—discussed issues of public policy. Among the first of these were *The Nation*, the *Atlantic Monthly*, and *Harper’s*, founded in the 1850s and 1860s; later came the more broadly based mass-circulation magazines such as *McClure’s*, *Scribner’s*, and *Cosmopolitan*. They provided the means to develop a national constituency for certain issues such as regulating business (or in the language of the times, “trust-busting”), purifying municipal politics, and reforming the civil service system. Lincoln Steffens and other so-called muckrakers were frequent contributors to the magazines, setting a pattern for what we now call “investigative reporting.”

The national magazines of opinion provided an opportunity for individual writers to gain a nationwide following. The popular press, though initially under the heavy influence of founder-publishers, made household words out of certain reporters’ and columnists’ names. In time, the great circulation wars between the big-city daily newspapers started to wane, as the more successful papers bought up or otherwise eliminated their competition. This reduced the need for the more extreme forms of sensationalism, a change reinforced by the growing sophistication and education of America’s readers. And the founding publishers were replaced gradually by less flamboyant managers. All of these changes—in circulation needs, audience interests, managerial style, and the emergence of nationally known writers—helped increase the power of editors and reporters.

Though writers may have been identified with social causes during the muckraking era, they became less identified with political parties. During the late 19th and early 20th centuries, overt partisanship in journalism largely faded away, as journalists and editors sought to be objective and neutral in their coverage of politics (we discuss later in the chapter if they actually live up to that ideal). A more mainstream non-partisan press gradually replaced the partisan press.<sup>43</sup>

## Electronic Journalism

Radio came on the national scene in the 1920s, television in the late 1940s. They represented a major change in the way news was gathered and disseminated, though at first



**IMAGE 6-6** News used to come by radio, but today many people read news on iPads and other electronic devices.

few politicians understood the importance of this change. A broadcast permits public officials to speak directly to audiences without their remarks being filtered through editors and reporters. This obviously was an advantage to politicians, provided they were skilled enough to use it; in theory they could reach the voters directly on a national scale without the services of political parties, interest groups, or friendly editors.

But there was an offsetting disadvantage—people could easily ignore a speech broadcast on a radio or television station, either by not listening at all or by tuning in to a different station. By contrast, the views of at least some public figures would receive prominent and often unavoidable display in newspapers, and in a growing number of cities there was only one daily paper. Moreover, space in a newspaper is cheap compared to time on a television broadcast.

Adding one more story, or one more name to an existing story, costs the newspaper little. By contrast, less news can be carried on radio or television, and each news segment must be quite brief to avoid boring the audience. As a result, the number of political personalities that radio and television news can cover is much smaller than is the case with newspapers, and the cost (to the station) of making a news item or broadcast longer often is prohibitively large.

Thus, to obtain the advantages of electronic media coverage, public officials must do something sufficiently bold or colorful to gain free access to radio and television news—or they must find the money to purchase radio and television time. The president of the United States, of course, is covered routinely by radio and television and ordinarily can get free time to speak to the nation on matters of importance. All other officials must struggle for media attention by making controversial statements, acquiring a national reputation, or purchasing expensive time.

Until the 1990s, the “big three” television networks (ABC, CBS, and NBC) together claimed 80 percent or more of all viewers. Their evening newscasts dominated electronic media coverage of politics and government affairs. When it came to presidential campaigns, for example, the three networks were the only television games in town; they reported on the primaries, broadcast the party conventions, and covered the general election campaigns, including any presidential debates. But over the last few decades, the networks’ evening newscasts have changed in ways that have made it harder for candidates to use them to get their messages across. For instance, the average **sound bite**—a video clip of a presidential contender speaking—dropped from about 42 seconds in 1968 to less than 8 seconds by 2004.<sup>44</sup> Furthermore, the audience for these broadcasts has shrunk dramatically in recent decades: Since 1980, the audience for these programs has declined by more than half—from more than 50 million to just over 22.5 million viewers.<sup>45</sup>

Today, politicians have sources other than the network news for sustained and personalized television exposure. Politicians appear routinely on news magazines, the Sunday talk shows, early-morning television programs, late-night comedy programs, and cable news stations such as Fox News, MSNBC, or CNN. This does not even cover the vast array of online venues where politicians also can seek

exposure to air their points of view. We discuss below what effect this might have on viewers and American government more broadly.

## The Internet

More than half of all Americans used the Internet to get political news about the 2010 mid-term elections, a trend that has continued in subsequent elections.<sup>46</sup> The Internet’s political news ranges from summaries of stories from newspapers and magazines to political rumors and hot gossip. For example, viewers may scan political ideas posted on a **blog**; many blogs specialize in offering liberal, conservative, or libertarian perspectives. The Internet is the ultimate free market in political news; no one can ban, control, or regulate it, and no one can keep facts, opinions, or nonsense off of it.

The rise of the Internet has completed a remarkable transformation in American journalism. In the days of the party press, only a few people read newspapers. When mass-circulation newspapers arose, mass politics also arose. When magazines of opinion developed, interest groups also developed. When radio and television became dominant, politicians could build their own bridges to voters without party or interest-group influence. And now, with the Internet, voters and political activists can talk to each other. This is true in democracies like the United States, but also in authoritarian regimes. For example, the ability for activists to communicate through sites like Twitter and Facebook was an important factor fueling the Arab Spring revolutions in 2011. It is becoming much harder for a powerful leader to control what other people can learn.

Of course, today it is not enough to just talk about “the Internet” as an undifferentiated collection of websites. Not only can voters read the news online or go to a campaign’s website, they can also follow politics via social media and on their smartphones. One recent study found that, among those who used the Web, 48 percent said they got news about government and politics from Facebook in the week past. In this study, Facebook was tied with local news, and ranked ahead of both cable and broadcast news, as a source of information.<sup>47</sup> An increasing number of Americans also follow political figures on Twitter, Facebook, and other social media platforms; more than one-quarter of Americans (and more than 40 percent of those under age 49) tracked politics on their cell phones during the 2014 elections.<sup>48</sup> Politicians, recognizing that this is an important way of reaching out to voters, now work to craft their social media presence carefully. For example, President Obama has a team of people who use social media outlets to promote the president’s policies.<sup>49</sup> Technology firms such as Facebook are also partnering with politicians and campaigns to allow them to better target potential voters.<sup>50</sup> Politics, like most other activities in the 21st century, has entered the digital age.

But what have been the effects of the Internet, Facebook, Twitter, and the like? The evidence is somewhat more mixed than you might think.

**sound bite** A radio or video clip of someone speaking.

**blog** A series, or log, of discussion items on a page of the World Wide Web.



First, many had hoped that the Internet would give people access to a wider range of political information than ever before. At some level, this is no doubt true: If you can write it down, you can post it online (a search of comment sections on many online articles will convince you that people can believe the most seemingly implausible theories). However, this democratizing impact has been quite muted in practice. Most people find political news online through major search engines or by visiting leading news sites (like Yahoo! News, Google News, or major news organizations like the *New York Times*' website). Many of the links shared on Facebook and other social media outlets also connect to these dominant sites. While people can search out different or alternative voices online, most do not. As a result, online news largely looks like offline news, just in a different format.<sup>51</sup>

Second, many had hoped that the Internet would transform how much people know about politics, especially young people. But as you might suspect given what we said above, the effect again has been relatively modest. The Internet makes a world of political information available to you; if you love politics, you have never had access to more information about politics and public affairs than you do now. However, it also has never been easier to avoid politics if you want to, by searching for sports, entertainment news, or funny cat videos. After all, political web traffic makes up just a tiny slice of Internet traffic: About 3 percent of web traffic goes to news sites, and about 0.12 percent (that's twelve one-hundredths of one percent) goes to political sites.<sup>52</sup> As a result, the Internet has not led most people to become much better informed about politics.<sup>53</sup>

Third, many also had hoped that the Internet and social media campaigns would change political organization. Here, there is stronger evidence that the Internet has changed politics in the way people had hoped. For example, grassroots

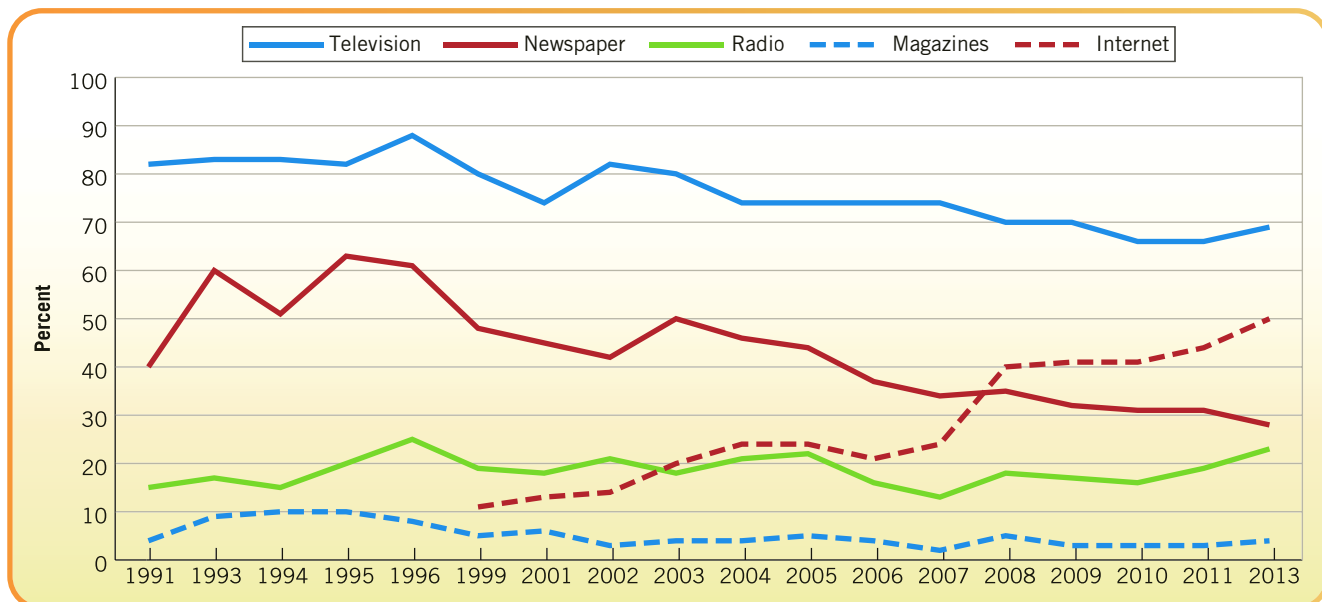
organizing for many groups, especially on the political left, has been aided greatly by the Internet.<sup>54</sup> The most classic group is MoveOn.org, which since its founding in 1998 has used online tools to organize for political causes, often generating significant offline activism. Other groups have used similar online techniques to facilitate organizing and mobilizing voters.

This electronic mobilization also has helped to increase voter participation and engagement, especially among young people. For example, in Chapter 8 we will discuss how get-out-the-vote operations—especially in-person operations—can boost turnout. But some groups are especially hard to reach through such in-person visits, especially young people, who are more likely to live in apartment buildings (where canvassers cannot gain entry), or have evening plans or jobs and so are not at home when canvassers knock on the door. Sending these voters text messages, however, can increase their voter turnout.<sup>55</sup> Similarly, many groups are turning to online tools to mobilize young people politically, often with success.<sup>56</sup> In short, the Internet may not have transformed what people know about politics, but it has changed political activism and activity.

## 6-5 Where Do Americans Get Their News?

Above, we suggested that more Americans are turning online to find political news. But more broadly, where do Americans get their news and information about politics? Do they surf the Web, watch TV, read newspapers, or listen to the radio? And how has this pattern changed over time? Figure 6-6 uses data from the Pew Research Center to track where Americans get their news over time.

**FIGURE 6-6** Over-Time Trends in News Sources



**Source:** Pew Research Center, "Amid Criticisms, Support for Media's 'Watchdog' Role Stands Out," August 2013.



Over the past 25 years, television has been the dominant source of news for most Americans: At least two-thirds of Americans in every year report that TV is one of their most important sources of news. Most Americans turn to television (which would include local TV news, network TV news, and cable TV news) to learn about politics. However, the number doing so has fallen somewhat from the 1990s, when more than 80 percent of Americans primarily relied on television.

What has taken the place of television? The Internet. Prior to 2000, the Internet was not a viable option for most Americans. But with the large-scale expansion of broadband connections (and the end of slow and unreliable dial-up modems), the Internet increasingly has become a key news source. Indeed, looking at the long-term trends, it seems plausible that one day the Internet will overtake television as the main source of political news.

Newspapers, which once trailed only television as a news source, are becoming a less-important source of information for many Americans (though, as we explain below, they still have a critical role to play as journalistic watchdogs). As circulations and advertising revenues decline, and more newspapers close, this trend is likely to continue. The other sources of news—radio and magazines—were never very popular in this time period, and have not really changed much over time.

These trends tell us what has happened to all Americans over time, but how do these patterns differ by age? Figure 6-7 shows the most recent year of data (2013) and breaks it down by age cohort.

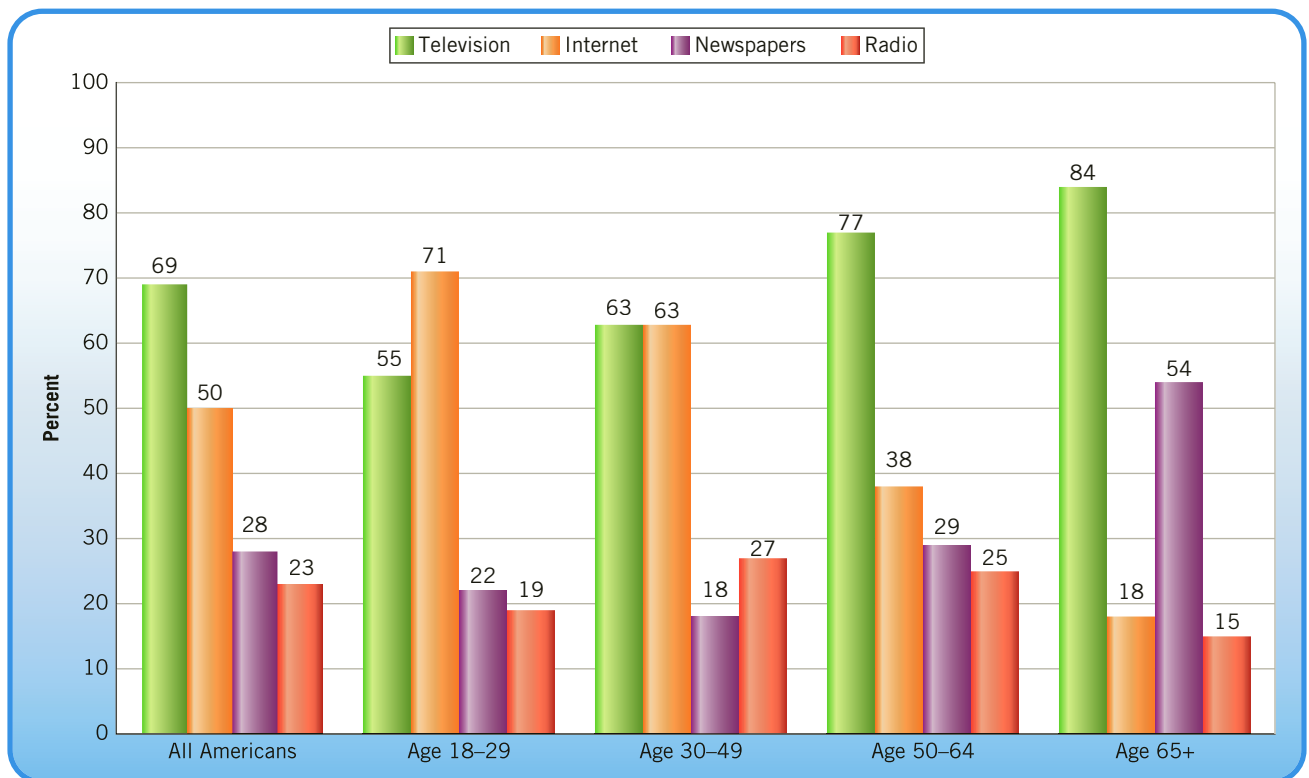
These data echo the patterns seen above in Figure 6-6: Television is the dominant news source for most Americans, and the Internet is becoming a close second. But there is a striking age pattern that helps us to understand why the data in Figure 6-6 look the way it does. While television is the unquestioned champion of information sources for voters age 50 and older, it is much less so for younger voters. Indeed, for the youngest cohort, the Internet leads television by a wide margin; and the Internet and TV are equally important sources for those ages 30–49. In the coming decades, it is likely that the Internet will be the dominant news source for all Americans, not just the young.

The age profile also helps us to understand the sharp decline of newspapers seen above. The only group still reading newspapers at a substantial level is the group aged 65 and older, suggesting an even more dire picture of their health than the one given in Figure 6-6.

## 6-6 Media Effects

So far, we have seen how the media developed over time in American politics, and how Americans consume news. But what, exactly, does the media do in politics? How do the media affect politics? At the broadest level, the media serves to inform the public about politics and public affairs. While this entails many components, three in particular are noteworthy. First, the mass media helps to set the political agenda—that is, it shapes what people think about. Second,

**FIGURE 6-7** Americans' Main Source for News



**Source:** Pew Research Center, “Amid Criticism, Support for Media’s ‘Watchdog’ Role Stands Out,” August 2013. Figures do not total to 100 percent because subjects could name two main sources of news.

**agenda-setting or gatekeeping** The ability of the news media, by printing stories about some topics and not others, to shape the public agenda.

**priming** The ability of the news media to influence the factors individuals use to evaluate political elites.

**framing** The way in which the news media, by focusing on some aspects of an issue, shapes how people view that issue.

it frames political issues and influences how people understand them. Finally, it helps serve as a watchdog to guard against corruption and hold politicians accountable.

## Setting the Public Agenda

One vital role of the media is to help set the agenda. On any given day, far more happens than any one paper or news outlet could report. Part of the job of journalists is to decide what stories are important enough to report. This process is known as **agenda-setting** or **gatekeeping**. By covering some issues but not others, the mass media shapes the issues being discussed at any given point in time.<sup>57</sup>

How do journalists decide which stories to cover? That is not easy to answer, as journalists use a variety of different selection criteria. But many of the stories that they report on include familiar people, focus on conflict or scandal, and are timely.<sup>58</sup> This helps to explain why political stories often attract a great deal of attention, as they feature all of those characteristics.

Some people argue that the mass media can manipulate the agenda, and cause individuals to care about problems that are not especially important. This can happen, but it is relatively uncommon. More typically, the mass media's attention to problems is dictated largely by important real-world events. For example, when the government foils a terrorist plot, there are a large number of stories about it in the news, and people become more concerned about terrorism. Likewise, as California entered a record drought in recent years, the story received more coverage in the news, and voters viewed it as a more important problem. The media do set the agenda, but that agenda is influenced heavily by what is happening in the real world.

Some people read about theories like agenda-setting and assume that scholars think ordinary people are just the pawns of a powerful media: If the media tells people that issue X is important, then they think it's important. This somewhat cynical view, however, is too simplistic. Rather, ordinary people are making a more subtle judgment. They assume that if the mass media is talking about a story, then it must be important (otherwise, the media would talk about something else).<sup>59</sup> People use the media's discussion of a topic as a cue that said topic is important. Agenda-setting reflects engagement with the news more than blind obedience to the media.

Not only does the media help to set the political agenda, they also influence which issues the public uses to assess its political leaders. This process is known as **priming**. The

basic logic of priming is an extension of agenda-setting. When the mass media covers an issue, viewers assume it is important. As a result, they rely on that issue more heavily when evaluating political elites.<sup>60</sup>

We saw a potent example of priming during the George W. Bush presidency. Prior to 9/11, approval of President Bush was closely tied to perceptions of how well he was handling the economy: those who approved (disapproved) of Bush's handling of the economy tended to approve (disapprove) of Bush overall. But after the 9/11 attacks—and the ensuing spike in media attention to terrorism—evaluations of how well Bush handled terrorism became much more important. Similarly, after the 2008 financial crisis, evaluations of the president were much more closely tied to evaluations of his handling of the economy.<sup>61</sup>

Much as with agenda-setting, the point of priming is not to suggest that voters are fools led by the media. Rather, viewers use the media's coverage of an issue to infer that it is important (and hence should be the basis of political judgments). In fact, it is the more-informed viewers who are most susceptible to priming effects.<sup>62</sup> More-informed viewers are the ones who understand how to take what they learned in the media reports and apply it to evaluating a particular politician. Priming is not a consequence of voter ignorance—rather, it comes from voter knowledge.

## Framing

**Framing** refers to the way in which the media presents a particular story. By presenting some aspects of an issue and ignoring others, the media influences how people think about that issue.<sup>63</sup> For example, suppose you are undecided about whether the U.S. should expand domestic production of oil and natural gas. If you watched one news report that emphasized the large number of high-paying jobs that would be created, you might be more likely to support more oil and gas production. By contrast, if you instead saw a report suggesting more drilling for oil and gas would damage the environment seriously, you might be more strongly opposed to it. The way in which the media frames the issue—as one of job creation versus environmental damage—shapes your opinion.



**IMAGE 6-7** News stories about terrorist groups such as ISIS have increased the salience of terrorism in recent years. This is an example of agenda setting.

Dabiq/ZUMA Press/Newscom

This makes framing a particularly important type of media effect; by influencing the way people understand an issue, framing shapes people's attitudes. Framing is a key way the media works to change attitudes. But in most cases, framing effects are more modest than massive. Why? Because typically, media outlets present both sides of the story (remember the journalistic norms of balance discussed earlier). So in our example of oil drilling, they would present both the increased jobs and the risk to the environment at the same time. As a result, the frames partially wash each other out, and the overall effect is rather modest. Most people end up close to where they would be without the frame.<sup>64</sup>

But framing need not be so innocuous. In particular, there are some cases where the media presents a lopsided frame that favors one side of the issue—in which case there can be larger, and more pernicious, effects. For example, the way in which the mass media reports on public assistance programs also weakens support for them. Media reports on these programs discuss waste and fraud in the system, and focus on individuals who abuse such programs. Such abuses are less common, however, than one would suspect from many media reports. But because the media report on the abuses in these programs (consistent with its watchdog role), people suspect waste, fraud, and abuse are widespread. The mass media frame for welfare programs, then, shapes and limits public support for them.<sup>65</sup>

The point here is not to suggest that there is no abuse of public assistance programs—of course there is. But the problem is that the media is only giving us part of the story by privileging one frame over another. We need to hear both sides of the story to make an informed decision. We wanted to hear about both the economic gains and the environmental risk of more drilling to make an informed decision, and the case of public assistance programs is no different. When you hear news stories discussing particular issues, think carefully about what is being presented, and equally important, what is not.

## The Media as Watchdog: Political Accountability

Another core function for the media is to serve as a **watchdog** to guard against fraud and abuse, and to hold politicians to account for their campaign promises. Americans see this as a vital role for the media. While they are critical of the media in many respects, particularly on the question of bias, more than two-thirds of Americans think the media keeps leaders from doing things that should not be done.<sup>66</sup> As we discussed above, the idea of the journalist as watchdog has a long history in American politics, and continues to be important today.

The press also helps to ensure that politicians respond to public opinion. Several studies have found that when newspapers report more frequently on their local members of Congress, members are more likely to follow their constituents' wishes on legislative votes.<sup>67</sup> When the media reports on what politicians are doing in office, voters have more information about politicians' decisions. This makes it easier

for voters to hold politicians accountable for their decisions, and hence politicians respond accordingly. Press coverage of politics helps to promote political accountability.

Of course, the challenge to this finding is that local newspapers are in decline. Local television news gives scant attention to members of Congress, and national papers and television do not have the space or time to cover individual members, so it is unclear whether online venues will have the resources to investigate members' records in this way. Whether this important watchdog function continues into the future is unclear.

**watchdog** The press's role as an overseer of government officials to ensure they act in the public interest.

**game frame** The tendency of media to focus on political polls and strategy rather than on the issues.

**horse-race (scorekeeper) journalism** News coverage that focuses on who is ahead rather than on the issues.

## Can the Media Lead Us Astray?

The functions of the mass media we discussed above—setting the public agenda, framing issues, and serving as a watchdog—suggest a relatively positive role for the media. But the ways in which the media covers some issues can also lead us astray in some instances. In this section, we discuss several different ways in which media coverage can mislead and distort the truth. We do this to help readers become more informed consumers of the news media.

### Political Campaigns as a Political Game

In Chapter 8, we will explain how the media contributes to helping inform citizens about the candidates and issues in elections. To the extent that the media report on the substantive issues of the day, the public becomes better informed. And generally speaking, as a result of such coverage, the public does learn about the issues of the day through the media. But there is one dimension of campaign reporting that is more harmful than helpful: a focus on elections as a political game. This **game frame** for political reporting has two elements. First, there is a focus on where the candidates' stand in the polls: who is up, and who is down? This type of poll-based coverage is known as **horse-race (scorekeeper) journalism**. Second, there's a focus on tactics and strategy rather than substance: why did candidate X say Y? What does the trailing candidate need to do to get ahead? Together, they suggest to voters that style and strategy—not substance—decides elections.

Coverage of polls in elections is nothing new, and even predates the birth of modern public opinion polling. But over time, especially in the last few decades, stories about polls—and politicians' efforts to get ahead in the polls—have become strikingly more common. Over time, there has been less reporting on the substantive issues in elections.<sup>68</sup> In its place, journalists have substituted reports on the horse race and candidate strategy.<sup>69</sup>



Why do journalists devote so much time and attention to these types of stories? They do so for three main reasons.

First, readers like them. Reading about strategy and such is exciting, and suggests to readers that they're getting the "real scoop" behind the campaigns. Why understand what a candidate said when you can understand *why* he or she said it? Furthermore, most readers find substantive reporting rather dull. If you doubt this, sit down and read the candidates' position papers on various issues (you'll likely find it rather soporific). Unsurprisingly, given the choice, most voters opt for the horserace and strategy coverage over detailed, issue-focused coverage.<sup>70</sup>

Second, reporting on strategy—especially polling—is relatively easy, so it simplifies journalists' task in an era of shrinking resources. A poll result has a clear message, and does not require in-depth reporting the way a detailed piece on candidates' substantive positions would.<sup>71</sup>

Finally, this sort of coverage reflects the press's desire to be seen as independent of political elites. Because politicians control their substantive message carefully, reporters do not want to simply report on that, as it would make them seem like patsies being duped by politicians. Instead, they want to uncover the "real" story about why a candidate does what he does, so they write stories about candidates' strategies and motives.<sup>72</sup>

This horse-race coverage matters because it tends to make ordinary citizens more cynical about the political process.<sup>73</sup> It's not hard to see why: by promoting the idea that elections (and politics in general) are all about strategy and tactics—and not substance—the media make politics out to be just another game. This focus makes ordinary people think elections are not about the major issues. As we will discuss in Chapter 8, major issues—especially the health of the economy—are really the driver of the election, even if that message does not always come through in the media.

Luckily, there is a simple solution to combatting these sorts of effects. When you see the media discussing strategy and tactics, just ignore it. When you see the media obsessing over polling data, remember that the daily fluctuation in the polls reflects noise more than true movement, for reasons we will discuss in Chapter 8. Instead, seek out substantive coverage and focus there. It might be less entertaining, but it is far more helpful for casting an informed ballot.

## Negativity

The media also tends to focus on the negative in stories, rather than on the positive. This fits with the media's understanding of itself as a "watchdog," and the ensuing belief that they should be on the lookout for corruption and scandal. Furthermore, such stories attract more attention: finding evidence of fraud and abuse is more newsworthy than finding that government programs function effectively.

Such patterns are true of the media generally,<sup>74</sup> but this tendency has become especially pronounced in reporting on recent elections. One analysis of the 2016 primary season, looking at thousands of online news stories, found that all of the leading candidates received much more negative coverage than positive coverage.<sup>75</sup> Media reports emphasize the flaws and limitations of candidates and their policies.

Another example of this bias toward negativity is how journalists report on campaign promises. Overall, once in office, politicians generally *do* try to enact their campaign promises. Indeed, they often enact the vast majority of them, at least in part.<sup>76</sup> Why then do most voters think that politicians frequently break their promises? Part of the explanation is that the media—in keeping with its watchdog role—focuses on the cases where politicians break them.

More generally, focusing on waste, fraud, and abuse—and any area where government is not performing effectively—helps to expose corruption and abuse, but it also makes citizens more negative and cynical about government.<sup>77</sup> In short, if citizens hear stories suggesting that government is not functioning effectively, they take them to heart. While trying to root out waste, fraud, and abuse is generally a good thing, too much focus here can turn off voters and make them cynical about the process.

After reading this section on the ways in which media can lead one astray, you might think that you can never trust the media, but that is not correct. We wrote this section not to make you cynical about the media, but to help point out some ways in which the media can distort your understanding of politics. Become a skeptical news consumer, but not a cynical one.

## Are There Limits to Media Power?

After reading this section, you might think the media are quite powerful: they can shape the agenda, frame issues to influence opinions, and make viewers cynical with their focus on strategy and negativity. All of these effects are real, but it is important to understand that there is a very important limit to the media's effect on attitudes: people's experiences in everyday life.

In general, the media is most powerful when people know the least about an issue. As people know more and more about an issue, the media's effect is smaller.<sup>78</sup> For example, typically the media have less ability to move people on issues where they have more personal experience, such as the economy. If you see many of your neighbors lose their jobs—or if you lose your own—you do not need the media to tell you that the economy is struggling. By contrast, most people have less direct experience with ISIS, Ebola, or America's role in Afghanistan. On such issues, which are more removed from people's everyday lives, the media have a larger effect on attitudes.

Furthermore, in many situations, the media are constrained by elites. This might seem odd; we have just discussed ways—such as serving as a watchdog—that the media can act as a check on elites and prevent them from abusing power. This is certainly true. But in many cases, the media are also dependent on information from elites. For example, on foreign policy and terrorism, the media often cannot gather information on its own. Because of issues of national security, the government restricts what reporters can know, and information is leaked—often strategically, as we will see below—by people who are trying to advance a particular political position. Likewise, on technical or complex scientific issues such as Internet security, nuclear power,

or global warming, the media typically depends on elites to explain and clarify the issues at hand. As a result, much of the time media reports reflect the elite debate—that is, elites set the terms of the debate, and the media just pass along that debate to the mass public.<sup>79</sup> In short, while the media are powerful, they are often constrained in their ability to shape public opinion and public policy.

## 6-7 Is the Media Trustworthy and Unbiased?

Do Americans have confidence in the press? Do they think they can depend consistently on the press to get the information they need to be informed about politics and public affairs? Since the early 1970s, political scientists have been asking survey questions to gauge how much confidence individual citizens have in the press. We present these data in Figure 6-8.

The data are clear: Over time, Americans have become less confident in the press. In 1973 (the first year this question was asked), 23 percent of respondents had a great deal of confidence in the press, 62 percent had some confidence in the press, and 15 percent had hardly any confidence in the press. In 2014 (the most recent year), respondents were far less confident in the press. Now only 8 percent have a great deal of confidence, 48 percent have some confidence, and 45 percent have hardly any confidence. Since the 1970s, the number of people with a great deal of confidence in the press has declined sharply, and the number with no confidence has risen sharply; there has been a similar, albeit less steep, decline in those with some confidence in the press. In short, Americans trust the press less today than they did 40 years ago.

While the data in Figure 6-8 are the best over-time data we have available, other data show the same pattern of declining confidence in trust in the media. For example, the Gallup Organization has been asking about trust in the media since the 1970s as well, and finds that media trust is at an all-time low in recent years.<sup>80</sup> Likewise, recent data from the

Pew Research Center finds that 39 percent of Americans think they cannot trust the information they get from national news organizations.<sup>81</sup> No matter what data you use, it seems that Americans do not trust the press very much.

Why do Americans distrust the media? Why do they think they cannot be trusted? Part of the reason is undoubtedly the sorts of issues we discussed in the previous section: the emphasis on strategy and polls in election coverage, negativity, and so forth. But politicians are also partly to blame for the decline in news media trust. Democratic and Republican politicians alike criticize the press and attack it as biased and unfair. When they do that, it makes ordinary voters think that the press is biased and unfair, and hence, Americans trust the media less.<sup>82</sup>

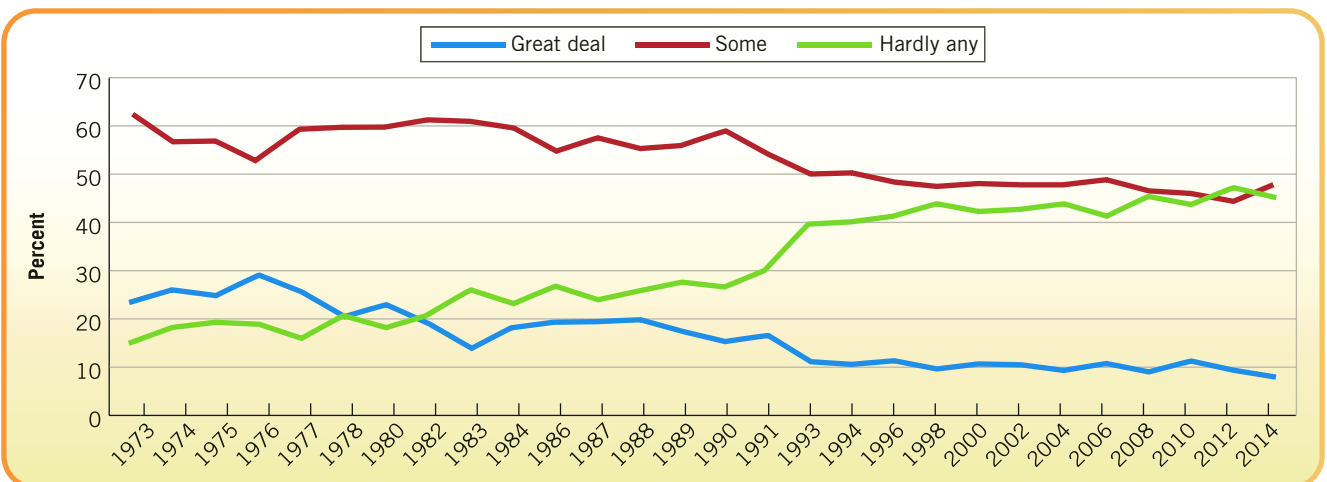
This suggests that by labeling the media as biased, politicians decrease trust in the media (we will get to whether the media is actually biased next). But there is another lesson here in how to be an informed consumer of the news. Remember that whenever a politician accuses the media of bias, he or she typically has an incentive to do so. Take that fact into account as you decide for yourself whether or not the media is actually biased in that particular instance.

## Is the Media Biased?

Above, we saw that Americans do not trust the media. Is this because it is actually biased? Most Americans certainly *think* that the media is biased. In a recent study from the Pew Research Center, only 26 percent of Americans thought the press gets its facts straight, only 20 percent thought it was pretty independent, and only 19 percent thought it was fair to all sides.<sup>83</sup> But are Americans' beliefs accurate? The answer, as we will see in this section, is subtler and less obvious than you probably think.

In any discussion of media bias, one of the first facts that most people mention is that journalists tend to be overwhelmingly liberal and Democratic. Many studies, dating back to the early 1980s, have concluded that members of the national press are more liberal than the average citizen.<sup>84</sup>

**FIGURE 6-8** Confidence in the Press, 1973–2014



**Source:** Author's analysis of the General Social Survey, 1973–2014

The public certainly believes that members of the media are liberals. A Gallup Poll done in 2014 found that 44 percent of Americans believe the media are “too liberal,” versus only 19 percent who thought they were “too conservative.”<sup>85</sup>

The liberal and Democratic bent of journalists, however, is not in and of itself enough evidence to conclude that the media are biased. While journalists are typically liberal, they are also committed to journalistic norms of objectivity and balance, which will counteract their personal biases.<sup>86</sup>

The best way to study media bias is to look at detailed content analyses of the media's coverage of politicians to determine if there is any bias in favor of one party or another. There are some studies that find evidence of a liberal, pro-Democratic bias in the media. The best of these is the work by Professor Tim Groseclose, who does identify examples of pro-Democratic media slant on some issues.<sup>87</sup> However, many more studies have been conducted that find that overall, media coverage is not biased in favor of one party or another. Scholars have come to this conclusion studying patterns of coverage in campaigns,<sup>88</sup> as well as coverage of politicians outside of campaigns.<sup>89</sup> Studies find that, if anything, media outlets tend to favor incumbents—regardless of party. News outlets (especially newspapers) that endorse candidates are much more likely to endorse the incumbent;<sup>90</sup> endorsed candidates receive more positive coverage in those outlets and in turn are better liked by voters.<sup>91</sup> In general, then, there does not seem to be much overall evidence in favor of the media slanting in favor of one party or the other.

This overall lack of clear bias stems not only from journalistic norms of balance and objectivity, but from economics as well. Media outlets need to attract viewers and advertisers to stay in business. If media outlets are too biased or slanted, they will lose audience share.<sup>92</sup> Given that most Americans are relatively centrist (as we saw earlier in this chapter), mainstream outlets want to cater to the typical American. If these outlets lose viewers, they will be less attractive to advertisers, who want to reach as many people as possible.<sup>93</sup> Given this, it makes economic sense for most outlets to be relatively politically balanced.

## 6-8 Government Regulation of the Media

Ironically, the least competitive media outlets—newspapers—are almost entirely free from government regulation, while the most competitive ones—radio and television stations—must have a government license to operate and must adhere to a variety of government regulations. And the Internet has effectively no content regulations at all.

Newspapers and magazines need no license to publish, their freedom to publish may not be restrained in advance, and they are liable for punishment for what they do publish only under certain highly restricted circumstances. The First Amendment has been interpreted as meaning that no government, federal or state, can place “prior restraints” (i.e., censorship) on the press except under very narrowly defined circumstances.<sup>94</sup> When the federal government sought to prevent the *New York Times* from publishing the Pentagon Papers, a set of secret government documents stolen by an antiwar activist, the Supreme Court held that the paper was free to publish them.<sup>95</sup>

Once something is published, a newspaper or magazine may be sued or prosecuted if the material is libelous or obscene, or if it incites someone to commit an illegal act. But these usually are not very serious restrictions, because the courts have defined *libelous*, *obscene*, and *incitement* so narrowly as to make it more difficult here than in any other nation to find the press guilty of such conduct. For example, for a paper to be found guilty of libeling a public official or other prominent person, the person must not only show that what was printed was wrong and damaging but must also show, with “clear and convincing evidence,” that it was printed maliciously—that is, with “reckless disregard” for its truth or falsity.<sup>96</sup> When in 1984 Israeli General Ariel Sharon sued *Time* magazine for libel, the jury decided the story *Time* printed was false and defamatory but that *Time* had not published it as the result of malice, and so Sharon did not collect any damages.

There are also laws intended to protect the privacy of citizens, but they do not really inhibit newspapers. In general, your name and picture can be printed without your consent if they are part of a news story of some conceivable public interest. And if a paper attacks you in print, the paper has no legal obligation to give you space for a reply.<sup>97</sup>

It is illegal to use printed words to advocate the violent overthrow of the government if by your advocacy you incite others to action, but this rule has only rarely been applied to newspapers.<sup>98</sup>

## Confidentiality of Sources

Reporters believe they should have the right to keep confidential the sources of their stories. Some states agree and have passed laws to that effect. Most states and the federal government do not agree, so the courts must decide in each case whether the need of a journalist to protect confidential sources outweighs the interest of the government to gather evidence in a criminal investigation. In general, the Supreme Court has upheld the right of the government to compel



**IMAGE 6-8** Many claim that the media have a liberal bias. For example, some claim that the media were more critical of Trump than of Clinton.



reporters to divulge information as part of a properly conducted criminal investigation, if it bears on the commission of a crime.<sup>99</sup>

This conflict arises not only between reporters and law enforcement agencies but also between reporters and persons accused of committing a crime. Myron Farber, a reporter for the *New York Times*, wrote a series of stories that led to the indictment and trial of a physician on charges he had murdered five patients. The judge ordered Farber to show him his notes to determine whether they should be given to the defense lawyers. Farber refused, arguing that revealing his notes would infringe upon the confidentiality he had promised to his sources. Farber was sent to jail for contempt of court. On appeal, the New Jersey Supreme Court and the U.S. Supreme Court decided against Farber, holding that the accused person's right to a fair trial includes the right to compel the production of evidence, even from reporters.

In 2005, two reporters were sentenced to jail when they refused to give prosecutors information about who in the Bush administration had told them that a woman was in fact

a CIA officer. A federal court decided they were not entitled to any protection for their sources in a criminal trial. *New York Times* reporter Judith Miller spent 85 days in jail; she was released after a government official authorized her to talk about their conversation. There is no federal shield law that will protect journalists, though such laws exist in 34 states.

In recent years, discussions of source confidentiality and shield laws have come back into the news once again, particularly in the context of the War on Terror. In recent years, several major stories about the fight against terrorism—from Abu Ghraib, to CIA black site prisons, to the NSA domestic surveillance programs—have been broken by whistleblowers from inside the government. In rare cases, most notably Edward Snowden, the person has been willing to come forward; but more have wanted to remain anonymous, as such individuals often have been subject to prosecution. This highlights a fundamental tension in a democratic society—between freedom of the press (and freedom to investigate government abuses), and the protection of government secrets.

## LEARNING OBJECTIVES .....

### 6-1 Discuss what “public opinion” is and how we measure it.

Public opinion refers to how people think or feel about particular things, including but not limited to politics and government. Today, it is measured commonly by means of scientific survey research or polls based on random samples of given populations and carefully worded questions.

### 6-2 Outline the major factors that shape public opinion.

Many different factors shape public opinion, but three key ones are political socialization and the family, demographics, and partisanship and political ideology. Political socialization refers to the influence of one's family on one's political views. Demographics refer to our underlying characteristics (race, gender, age, etc.) that shape our political beliefs. Finally, political partisanship and ideology are core values that shape and guide what people want from government, and hence influence their views on the issues.

### 6-3 Discuss the relationship between public opinion and public policy.

Generally speaking, public opinion drives policy: When opinion changes, so does policy, especially on salient issues or when the opinion change is especially large. But when a minority group is particularly politically consequential (typically because they are more

politically engaged on the issue), government policy follows the minority view, rather than the majority one.

### 6-4 Trace the evolution of the press in America, explaining how media coverage of politics has changed over time.

Over time, the press evolved from a partisan mouthpiece to an independent political actor. Today, through the Internet and television, politicians have more opportunity than ever before to shape their political images.

### 6-5 Summarize the most important sources of news for contemporary Americans.

Today, most Americans get their news from television, though the Internet is also increasingly important, especially for younger voters

### 6-6 Explain the main political functions of the media in America, and discuss how the media both enhance and detract from American democracy.

The mass media serves to help educate the public in a democracy. Two particular ways this happens are by setting the public agenda and by serving as a watchdog to maintain political accountability. There are also ways in which the media can lead viewers astray—through framing, covering campaigns as a game, or an overreliance on sensationalism and negativity. Viewers should be on guard to protect themselves from these tendencies.

**6-7 Discuss the reasons behind lower levels of media trust today, and summarize the arguments for and against media bias.**

Overall levels of trust in the media have declined sharply in recent years, both generally and for nearly all specific media outlets. Part of the reason is that politicians from both parties attack the media as biased, leading ordinary citizens to think the media is biased (and hence less trustworthy).

Overall, the evidence suggests that there is not much systematic bias in favor of one party or the other in the media.

**6-8 Explain how government controls and regulates the media.**

Government regulations control both media ownership and media content, though the First Amendment prohibits many stricter sorts of interference.

**TO LEARN MORE**

Pew Research Center: [www.people-press.org](http://www.people-press.org)

Roper Center for Public Opinion Research:  
[ropercenter.cornell.edu](http://ropercenter.cornell.edu)

**To Get Analyses of the Press:**

Nonpartisan view: [www.cmpa.com](http://www.cmpa.com)

Liberal view: [www.fair.org](http://www.fair.org)

Conservative view: [www.mrc.org](http://www.mrc.org)

**National Media:**

*New York Times*: [www.nytimes.com](http://www.nytimes.com)

*Wall Street Journal*: [www.wsj.com](http://www.wsj.com)

*Washington Post*: [www.washingtonpost.com](http://www.washingtonpost.com)

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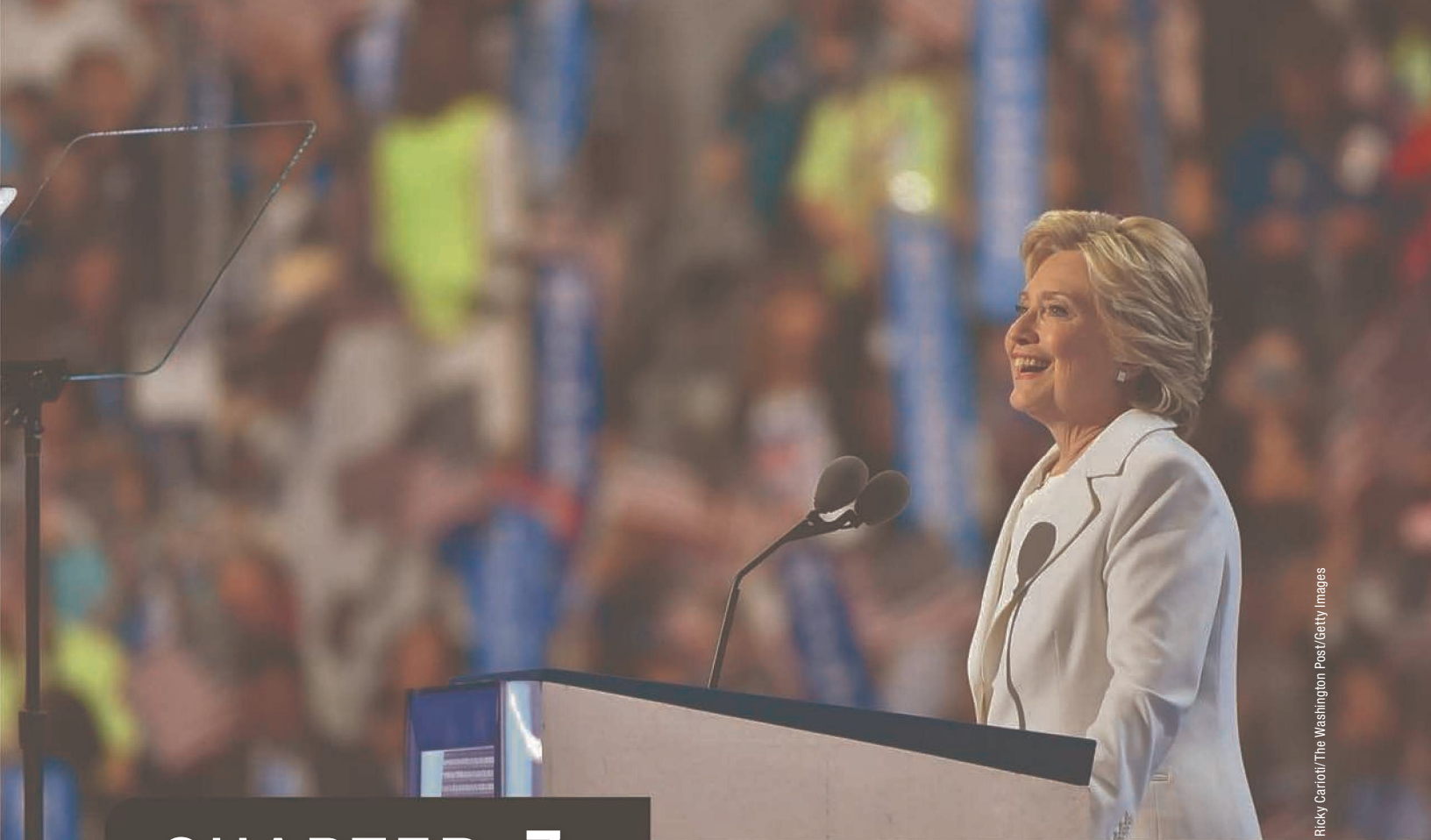
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## CHAPTER 7

# Political Parties and Interest Groups

### LEARNING OBJECTIVES

- 7-1** Describe the roles of American political parties and how they differ from parties in other democracies.
- 7-2** Summarize the historical evolution of the party system in America.
- 7-3** Explain the major functions of political parties, and how they are organized.
- 7-4** Define partisan identification, and explain how it shapes the political behavior of ordinary Americans.
- 7-5** Summarize the arguments for why America has a two-party system.
- 7-6** Explain what an interest group is, and identify the main factors that led to their rise in America.
- 7-7** Summarize the ways interest groups relate to social movements.
- 7-8** Explain the various ways interest groups try to influence the policymaking process.
- 7-9** Describe the ways in which interest groups' political activity is limited.



**political party** A group that seeks to elect candidates to public office.

In later chapters, we will discuss each of the four major government institutions in America: Congress (Chapter 9), the presidency (Chapter 10), the bureaucracy (Chapter 11), and the judiciary (Chapter 12). These institutions shape government policy profoundly, but so do a set of non-government institutions: the media (covered in chapter 6), political parties, and interest groups. In this chapter, we explore how the latter two non-governmental institutions arose, how they affect government policy, and how they matter to the future of American democracy.

## THEN

The Founders disliked parties, thinking of them as “factions” motivated by ambition and self-interest. George Washington, dismayed by the quarreling between Alexander Hamilton and Thomas Jefferson in his cabinet, devoted much of his Farewell Address to condemning parties. This hostility toward parties was understandable: the legitimacy and success of the newly created federal government were still very much in doubt. When Jefferson organized his followers to oppose Hamilton’s policies, Hamilton and *his* followers thought that Jefferson was opposing not just a policy or a leader but also the very concept of a national government. Jefferson, for his part, thought Hamilton was not simply pursuing bad policies but was subverting the Constitution itself. Before political parties could become legitimate, people had to distinguish between quarrels over policies and elections from disputes over the legitimacy of the new government itself. The ability to make that distinction was slow in coming; thus, parties were objects of profound suspicion, at first defended only as temporary expedients.

## NOW

American political parties are the oldest in the world, dating back to the first decade of the republic. Thirty years ago many claimed they were in decline, but today they have resurged in important ways. New parties and affiliated movements (like the Green Party launched in 2000 by consumer advocate Ralph Nader, or the Tea Party movement that developed after the 2008 presidential election) may come and go; but two parties, the Democratic and Republican, still dominate the country’s campaigns and elections. Media consultants, pollsters, and other advisors have not replaced party leaders. What distinguishes political parties from other groups, and why are they a fundamental feature of American politics?

## 7-1 What Is a Party?

A **political party** is a group that seeks to elect candidates to public office by giving them a label—a “party identification”—by which they are known to the electorate.<sup>1</sup> This definition is purposefully broad so that it will include parties that are both familiar (Democratic, Republican) and unfamiliar (Whig, Libertarian, Socialist Workers), and will cover periods

in which a party is very strong (having an elaborate and well-disciplined organization that provides money and workers to its candidates) as well as periods in which it is quite weak (supplying nothing but the label to candidates).

Political scientists think of parties as having three parts. A party exists as an *organization* that recruits and campaigns for candidates, as a *label* in the minds of voters, and as a *set of leaders* who try to organize and control the legislative and executive branches of government.<sup>2</sup> All three parts play an important role in the functioning of American democracy.

First, parties recruit and support candidates in elections. Party leaders work to find potential candidates and recruit them to run for office, and then help them win the party’s nomination. They then help these candidates raise money, conduct polls and focus groups, and develop advertisements to win the general election as well.

Second, parties exist in the heads of voters. When Americans walk into a polling place, many identify as either a Democrat or a Republican. As we will see later in the chapter, this label—whether voters consider themselves Democrats or Republicans—powerfully shapes how they evaluate political leaders and how they vote in elections.

Third, parties also coordinate behavior among elite politicians in office. As we see in Chapter 9, the majority party in the House and the Senate has the responsibility of organizing the chamber. Furthermore, congressional parties work with the president to try to implement his legislative agenda. Sometimes, the president and Congressional parties are in near-complete agreement on an issue, as when nearly all House Democrats supported—and all House Republicans opposed—final passage of the Patient Protection and Affordable Care Act, better known as Obamacare.<sup>3</sup> But at other times, the president and the party diverge greatly on what they want—as in the case of free trade, where President Obama supported more free trade agreements, but many congressional Democrats did not.<sup>4</sup>

In this chapter, we discuss the first two dimensions of party politics: how parties help elect candidates and how they shape the behavior of ordinary voters. We defer the third aspect of parties—parties as coordination devices among elected politicians—to later chapters (see especially Chapter 9 on Congress and Chapter 10 on the presidency).

What makes a party powerful? A powerful party is one whose label has a strong appeal for voters, whose organization can decide who will be candidates and how their campaigns will be managed, and whose leaders can dominate one or all branches of government. In the late 19th century, political parties in America reached their zenith in all three areas: voters were very loyal to their parties (largely because of patronage and other factors), party leaders dominated the Congress, and party bosses controlled who ran for office. In the 20th century, parties weakened considerably along all three dimensions. But in more recent decades, parties have regained some of their strength, though they are not as powerful as they were in the 19th century. As we see throughout this chapter, the reason for the decay and resurgence of parties is deeply rooted in political factors.

## Political Parties at Home and Abroad

While American parties have been weaker or stronger over time, in general they have been weaker than parties in many other advanced industrialized democracies, especially parliamentary democracies. There are several important reasons for this disparity in power.

First, in many other systems, parties control access to the ballot. In the great majority of American states, the party leaders do not select people to run for office; by law, the voters choose those people in **primary elections**. Though sometimes the party can influence who will win a primary contest, ultimately it is up to the voters to decide. In Europe, by contrast, there is no such thing as a primary election; the only way to become a candidate for office is to persuade party leaders to put your name on the ballot. Obviously this gives party leaders much more sway over their members; if ordinary members get out of line, the party can threaten to remove their names from the ballot in the next election.

Second, in a parliamentary system, the legislative and executive branches are unified, rather than divided as they are in America. If an American political party wins control of Congress, it does not—as in most European nations with a parliamentary system of government—also win the right to select the chief executive of the government. The American president is elected independently, and this means that the president will choose his or her principal subordinates not from among members of Congress but from among persons outside of Congress. Should the president pick a representative or senator for his or her cabinet, the Constitution requires that person to resign from Congress in order to accept the



**IMAGE 7-1** Posters supporting parties in Israel's 2015 elections.

job. Thus, an opportunity to be a cabinet secretary is not an important reward for members of Congress, and so the president cannot use the prospect of that reward as a way of controlling congressional action, as the prime minister could in a parliamentary system.

### **primary elections**

An election held to determine the nominee from a particular party.

Third, the federal system of government in the United States decentralizes political authority and thus decentralizes political party organizations. For nearly two centuries, most of the important governmental decisions—regarding education, land use, business regulation, and public welfare—were made at the state and local levels, and so the important struggles over power and policy occurred at the state and local levels. Moreover, most people with elective or appointive political jobs worked for state and local government; thus, a party's interest in obtaining these jobs for its followers meant it had to focus on who controlled city hall, the county courthouse, and the state capitol. While power increasingly has been concentrated in Washington, D.C., in recent decades, many important decisions are still made at the state and local level.

Federalism, in short, meant American political parties would acquire jobs and money from local sources and fight local contests. This, in turn, meant the national political parties would be coalitions of local parties, and though these coalitions would have a keen interest in capturing the presidency (with it, after all, went control of large numbers of federal jobs), the national party leaders rarely had as much power as the local ones. The Republican leader of Cuyahoga County, Ohio, for example, could often ignore the decisions of the Republican national chair and even the Ohio state chair. All of these factors help to explain why American parties are generally weaker than parties in other nations.



## HOW WE COMPARE

### How Many Political Parties?

The United States has two political parties in Congress. Other countries have fewer or more significant national parties:

- China, 1
- Russia, 4
- Canada, 5
- Germany, 6
- Mexico, 7
- Israel, 14
- Italy, 16 (more or less)
- France, 18
- Brazil, 30

**Source:** The CIA World Factbook, Political Parties and Leaders, <https://www.cia.gov/library/publications/the-world-factbook/fields/2118.html>, accessed February 2015.

## 7-2 The Evolution of Political Parties in America

Our nation began without parties and, over time, their power has waxed and waned. Today, while parties are powerful in some respects, they are weaker in others. We can see this process in five broad periods of party history: (1) when political parties were created (roughly from the Founding to the 1820s); (2) when the more or less stable two-party system emerged (roughly from the time of President Andrew Jackson to the

Civil War); (3) when parties developed a comprehensive organizational form and appeal (roughly from the Civil War to the 1930s); (4) when party “reform” began to alter the party system (beginning in the early 1900s but taking effect chiefly from the New Deal until the late 1960s); and (5) the period of polarization and resurgence (from the late 1960s through to today).

## The Founding

The first organized political party in American history was made up of the followers of Thomas Jefferson, who, beginning in the 1790s, called themselves *Republicans*—hoping to suggest thereby that their opponents were secret monarchists.\* The followers of Alexander Hamilton kept the label *Federalist*, which once referred to all supporters of the new Constitution—hoping to imply that their opponents were “Antifederalists,” or enemies of the Constitution.

These early parties were loose caucuses of political notables in various localities, with New England strongly Federalist and much of the South passionately Republican. Jefferson and ally James Madison thought their Republican Party was a temporary arrangement designed to defeat John Adams, a Federalist, in his bid to succeed Washington in 1796. (Adams narrowly defeated Jefferson, who, under the system then in effect, became vice president because he had the second most electoral votes.) In 1800, Adams’s bid to succeed himself intensified party activity even more, but this time Jefferson won and the Republicans assumed office. The Federalists feared that Jefferson would dismantle the Constitution, but Jefferson adopted a conciliatory posture, saying in his inaugural address that “we are all Republicans, we are all Federalists.”<sup>5</sup> It was not true, of course: the Federalists detested Jefferson, and some had plans for New England to secede from the Union. But it was good politics, expressing the need of every president to persuade the public that, despite partisan politics, the presidency exists to serve all the people.

So successful were the Republicans that the Federalists virtually ceased to exist as a party. Jefferson was reelected in 1804 with almost no opposition; Madison won two terms easily; James Monroe carried 16 out of 19 states in 1816 and was reelected without opposition in 1820. Political parties seemingly had disappeared, just as Jefferson had hoped. The parties that existed in these early years were essentially small groups of local notables. Political participation was limited, and nominations for most local offices were arranged rather casually.

## The Jacksonians

What often is called the second party system emerged around 1824 with Andrew Jackson’s first run for the presidency and lasted until the Civil War became inevitable. Its distinctive feature was that political participation became a mass phenomenon. For one thing, the number of voters to be reached had become quite large. Only about 365,000 popular votes were cast in 1824. But as a result of laws that enlarged the number of people eligible to vote and an increase in the population, by

1828 well over a million votes were tallied. By 1840, the figure was well over 2 million. (In England at this time, there were only 650,000 eligible voters.) In addition, by 1832 presidential electors were selected by popular vote in virtually every state. (As late as 1816, electors were chosen by the state legislatures, rather than by the people, in about half the states.) Presidential politics had become a truly national, genuinely popular activity; in many communities, election campaigns had become the principal public spectacle.

The party system of the Jacksonian era was built from the bottom up rather than from the top down, as it had been since the Founding. No change better illustrates this transformation than the abandonment of the system in which caucuses composed of members of Congress nominated presidential candidates. The caucus system was an effort to unite the legislative and executive branches by giving the former some degree of control over who would have a chance to capture the latter. The caucus system became unpopular when the caucus candidate for president in 1824 ran third in a field of four in the general election. It was completely discredited that same year when Congress denied the presidency to Jackson, the candidate with the greatest share of the popular vote.

To replace the caucus, the party convention was invented. The first convention in American history was held by the Anti-Masonic Party in 1831; the first convention of a major political party was held by the anti-Jackson Republicans later that year (it nominated Henry Clay for president). The Democrats held a convention in 1832 that ratified Jackson’s nomination for reelection and picked Martin Van Buren as his running mate. The first convention to select a man who would be elected president and who was not already the incumbent president was held by the Democrats in 1836; they chose Van Buren.

## The Civil War and Sectionalism

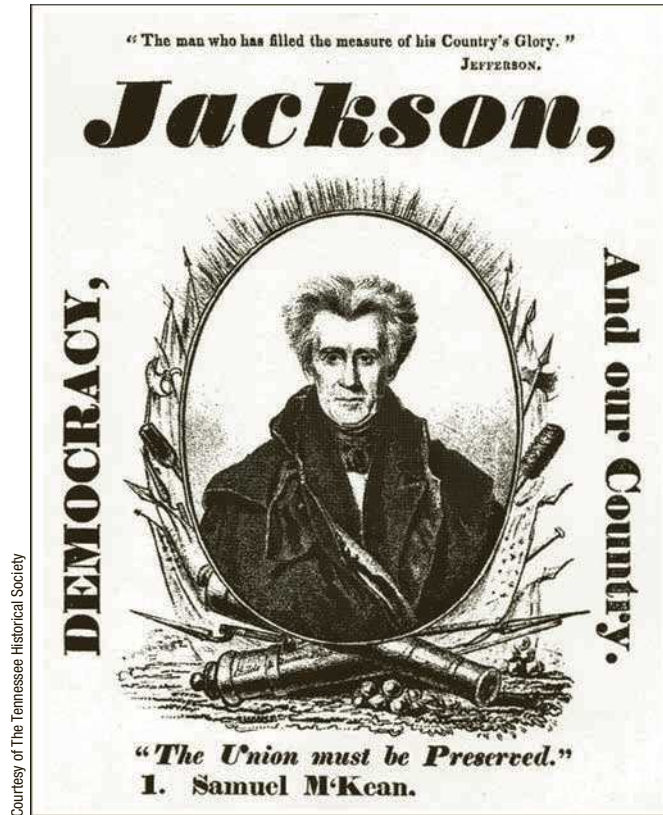
Though the party system created in the Jacksonian period was the first truly national system, with Democrats (followers of Jackson) and Whigs (opponents of Jackson) balanced fairly evenly in most regions, it could not withstand the deep split in opinion created by the agitation over slavery. Both parties tried, naturally, to straddle the issue, since neither wanted to divide its followers and thus lose the election to its rival. But slavery and sectionalism were issues that could not be straddled. The old parties divided and new ones emerged. The modern Republican Party (not the old Democratic-Republican Party of Thomas Jefferson) began as a third party. As a result of the Civil War, it became a major party (the only third party ever to gain major-party status) and dominated national politics, with only occasional interruptions, for three-quarters of a century.

Republican control of the White House, and to a lesser extent Congress, was in large measure the result of two events that gave Republicans a marked advantage in the competition for voters’ loyalties.

The first of these was the Civil War. This bitter, searing crisis polarized popular attitudes deeply. Those who supported the Union side became Republicans for generations; those who supported the Confederacy, or who had opposed the war, became Democrats.

\*The Jeffersonian Republicans were not the party that today we call Republican. In fact, present-day Democrats consider Jefferson to be the founder of their party.





Courtesy of The Tennessee Historical Society

**IMAGE 7-2** When Andrew Jackson ran for president in 1828, more than a million votes were cast for the first time in American history. This poster, from the 1832 election, was part of the emergence of truly mass political participation.

As it turned out, this partisan division was nearly even for a while; though the Republicans usually won the presidency and the Senate, they often lost control of the House. There were many northern Democrats. In 1896, however, another event—the presidential candidacy of William Jennings Bryan—further strengthened the Republican Party. Bryan, a Democrat, alienated many voters in the populous northeastern states while attracting voters in the South and Midwest. The result was to confirm and deepen the split in the country, especially North versus South, begun by the Civil War. From 1896 to the 1930s, with rare exceptions, northern states were solidly Republican, southern ones solidly Democratic.

This split had a profound effect on the organization of political parties, for it meant that most states were now one-party states. As a result, competition for office at the state level had to go on *within* a single dominant party (the Republican Party in Massachusetts, New York, Pennsylvania, Wisconsin, and elsewhere; the Democratic Party in Georgia, Mississippi, South Carolina, and elsewhere). Consequently, there emerged two major factions within each party, but especially within the Republican Party. One was composed of the party regulars—the professional politicians, the “stalwarts,” the Old Guard. They were preoccupied with building up the party machinery, developing

party loyalty, and acquiring and dispensing patronage—jobs and other favors—for themselves and their faithful followers. Their great skills were in organization, negotiation, bargaining, and compromise; their great interest was in winning.

The other faction, variously called **mugwumps** or **progressives** (or “reformers”), was opposed to the heavy emphasis on patronage; disliked the party machinery because it permitted only bland candidates to rise to the top; was fearful of the heavy influx of immigrants into American cities and of the ability of party regulars to organize them into “machines”; and wanted the party to take unpopular positions on certain issues, such as free trade. Their great skills lay in the areas of advocacy and articulation; their great interest was in principle.

At first the mugwumps tried to play a balance-of-power role, sometimes siding with the Republican Party of which they were members, at other times defecting to the Democrats (as when they bolted the Republican Party to support Democratic nominee Grover Cleveland in 1884). But later, as Republican strength in the nation grew, progressives within that party became less able to play a balance-of-power role, especially at the state level. If the progressives were to have any power, they came to believe, it would require an attack on the very concept of partisanship itself.

**mugwumps** or **progressives**  
Republican Party  
faction of the 1890s to  
the 1910s, composed of  
reformers who opposed  
patronage.

## The Era of Reform

Progressives began espousing measures to curtail or even abolish political parties. They favored primary elections to replace nominating conventions, because the latter were viewed as manipulated by party bosses; they favored non-partisan elections at the city level and in some cases at the state level; they argued against corrupt alliances between parties and businesses. They wanted strict voter registration requirements that would reduce voting fraud (but would also, as it turned out, keep ordinary citizens who found the requirements cumbersome from voting); they pressed for civil service reform to eliminate patronage; and they made heavy use of the mass media as a way of attacking the abuses of partisanship and of promoting their own ideas and candidacies.

The effect of these changes was to reduce substantially the worst forms of political corruption and ultimately to make boss rule in politics difficult, if not impossible. But they also had the effect of making political parties—whether led by bosses or by statesmen—weaker, less able to hold office-holders accountable, and less able to assemble the power necessary to govern the fragmented political institutions created by the Constitution. In Congress, party lines began to grow fainter, as did the power of congressional leadership. Above all, the progressives did not have an answer to the problem first faced by Jefferson: If there is not a strong political party, by what other means will candidates for office be found, recruited, and supported?

**critical or  
realignment periods**

A period when a major, lasting shift occurs in the popular coalition supporting one or both parties.

## Polarization and Resurgence

By the mid to late 20th century, political parties reached their nadir in America. In Congress, levels of party voting were quite low; congressional Democrats were divided into Northern and

Southern wings, which disagreed vociferously on segregation and civil rights for African Americans. Parties as organizations were weakened by the progressive-era reforms discussed previously, and voters' attachments to their parties weakened as well (see Figure 7-1 later in the chapter). Elections became much more about the candidate than the party, with the candidate responsible for his or her own fate (in sharp contrast to earlier eras of strong parties). Many scholars argued that parties were in a state of decline.<sup>6</sup>

But slowly, this situation began to change. In the aftermath of major civil rights fights in Congress, segregation was outlawed; the parties gradually began to take their modern positions on race, with Democrats more supportive of government efforts to address racial inequalities, and Republicans less so. This helped to transform the South—which had been solidly Democratic since the Civil War 100 years earlier—into a competitive, two-party region, and today, into one that more strongly favors Republicans.<sup>7</sup>

At the same time, the parties began to diverge not just on race, but on a whole host of issues, taking more distinct stands on taxes, abortion, women's rights, and so forth. As we discuss later, this change was due in part to the increasing importance of activists; as the party machines died, they were replaced with issue activists motivated by positions on particular issues. This helped to drive apart the parties on the major issues of the day, and make ideology—rather than patronage—the glue that holds the parties together. Today, at the elite level, the parties are fairly characterized as polarized, with Democrats on the left and Republicans on the right. We see this in Chapter 9 when we examine Congressional roll-call voting; Congressional elites today are nearly as divided as they were in the late 19th century. We also see this in recent party platforms, where the parties have been sharply divided on a host of issues such as abortion, gay marriage, tax cuts, and health care.

We also can see today's stronger parties reflected in the resurgent strength of parties as nominating bodies. In the era of party bosses, the party itself selected the nominee, but as we discussed above, the progressives dismantled this system and replaced it with a system of primary elections. The weakened state and local parties that followed from progressive reforms meant that members of Congress needed to develop their own personal organizations to win reelection. At the presidential level, a series of reforms in the 1970s (described below) similarly weakened the power of party bosses to select the nominee. But in the ensuing decades, parties have returned to greater importance. Parties now help to shape the field of candidates and influence who wins.<sup>8</sup> To be clear, party bosses can no longer pick candidates, and sometimes the candidate of the party elite loses—take Hillary Clinton in 2008, for example. But party

leaders have reasserted themselves in the candidate selection process, as we will see below.

The rise of such polarized parties has led some to bemoan this development and call for a weakening of parties. However, it is important to remember that stronger parties come with some benefits as well. In 1950, a committee of political scientists published a famous report arguing that we needed stronger parties to give voters clear and distinct policy alternatives.<sup>9</sup> Today, we arguably have parties that can do this for voters, and as a result, it is easier for them to make such choices.<sup>10</sup> But at the same time, such divided parties can generate gridlock and division. Polarized parties generate benefits, but they also come at a real cost.

## Party Realignments

Clearly there have been important turning points in the strength of the major parties, when dominance has shifted from one party to the other. To help explain these major shifts in the tides of politics, scholars have developed the theory of **critical or realignment periods**. During such periods a sharp, lasting shift occurs in the popular coalition supporting one or both parties. The issues that separate the two parties change, and so the kinds of voters supporting each party change. This shift may occur at the time of the election or just after, as the new administration draws in new supporters.<sup>11</sup>

There seem to have been five major realignments in American politics: 1800, when the Jeffersonian Republicans defeated the Federalists; 1828, when the Jacksonian Democrats came to power; 1860, when the Whig Party collapsed and the Republicans under Lincoln came to power; 1896, when the Republicans defeated William Jennings Bryan; and 1932, when the Democrats under Roosevelt came into office.

There are at least two kinds of realignments: one in which a major party is so badly defeated that it disappears and a new party emerges to take its place (this happened to the Federalists in 1800 and to the Whigs in 1856–1860), and another in which the two existing parties continue, but voters shift their support from one to the other (this happened in 1896 and 1932).

While such examples are still quite useful historically (and help to demarcate the different party systems in American politics), many scholars question the idea of realignment today.<sup>12</sup> They note that while parties have changed dramatically in recent decades, there is no single realigning election. Instead, the process has occurred gradually.<sup>13</sup> Furthermore, it is not that one issue replaced another, but rather that the parties have been divided on multiple salient issues: abortion, gay rights, the size of the economy, and so on.<sup>14</sup>

## 7-3 The Functions of Political Parties

Previously, we saw that parties exist primarily to help elect particular candidates to office. To actually achieve this goal, parties need to recruit candidates to run for office, nominate them, and then work to help them get elected in the general election by appealing to voters. All three activities are vital for parties to actually hold power.

## Recruiting Candidates

The first step in electing candidates to office is convincing them to run. Most people do not get involved in politics on their own and need to be asked. Political candidates are no different; many of them did not think about running until someone asked them to consider doing so. Party leaders are typically the people doing the asking.<sup>15</sup>

Such recruitment matters because running the right candidate increases a party's chances of winning the election. While the candidate is not the only factor (as we will discuss in the next chapter), it is an important one. Local, state, and national parties all work to recruit candidates for office.

## Nominating Candidates

Once a party has recruited candidates, they need to decide which candidates will run under the party's label in the general election. Historically, parties did this via party caucuses and conventions (see the discussion above). But since the progressive era, most such nominations have occurred via **primary elections**.

There are two main types of primary elections: closed primaries and open primaries. In a **closed primary**, only registered members of a political party may vote to select the nominee. Before the primary, voters must register with either the Democratic or the Republican Party. When they go to the polls to vote in the primary, they are given the ballot only for their party. The primary is closed to those outside the party. In this sort of primary system, Independent voters (those who are not registered with either major party) typically do not get to vote in the primary election.

In contrast, in an **open primary**, voters do not need to declare their party affiliation prior to going to the polls (indeed, in some states with open primaries, voters do not declare a party affiliation when they register). Citizens can vote in the primary of either party, but they can only vote in one party's primary (i.e., you can vote in the Democratic or the Republican primary, but not the Democratic *and* the Republican primary). One concern with open primaries is that there can be crossover voting: Voters from one party can vote in the other party's primary, and this may affect the outcome. While such crossover voting does occur, however, it typically does not decide the election outcomes.<sup>16</sup>

In recent years, some states also have experimented with the "top-two" primary election system. In these types of systems, all candidates compete on one primary election ballot, and the top two candidates—regardless of party—advance to the general election. So in this type of primary, a voter could vote for a Democrat for one office but a Republican for another, giving voters even more freedom than in an open primary. This system is used in California, Washington, and the Nebraska state legislature. A similar procedure is used in Louisiana: All candidates appear on the same primary ballot, and if a candidate receives 50 percent of the vote, they are elected directly to the office. If not, there is a runoff election with the top two finishers.

Scholars of primary systems argue that two consequences flow from a state's choice of primary system. First,

states with closed primaries tend to have stronger parties. The primary system probably is both a cause and an effect of the strength of the parties. Having strong parties means that the parties can mobilize in the state to prevent opening the primary process. A closed primary is also beneficial to party leaders: Because voters register with a party, party leaders know which voters will be most receptive to their political messages. Unsurprisingly, many party leaders favor closed primaries for just this reason.

Second, many reformers argue that open or top-two primaries favor moderate candidates. They claim that because all voters—rather than just members of one party—vote in these primaries, candidates will adopt more centrist positions. While intuitively appealing, there is little empirical support for this claim. It seems that the types of voters who actually vote in open (or top-two) primaries are not much different than in closed primaries, so the candidates they produce are not very different.<sup>17</sup> Hence, the type of primary system (open vs. closed vs. top two) does not really affect candidate polarization.

## Nominations via Convention

As we discussed above, nominations in most places occur through primary elections (though a few places, such as Utah, do make some use of conventions). But there is one major election where the nomination occurs via a convention: the national conventions to nominate candidates for president.

The national committee selects the time and place of the next national convention, and issues a "call" for the convention that sets forth the number of delegates allotted to each state and territory and the rules under which delegates must be chosen. These delegates then select the party's nominee at the convention.

There are two main types of delegates. First, there are the so-called pledged delegates. These are the delegates awarded through the presidential primaries and caucuses, with the understanding that they will support a particular candidate at the convention. So when you vote in a presidential primary or a caucus, you are actually voting for delegates pledged to one candidate or another. Each party has a formula for awarding delegates based on the results of the election; Democrats award delegates proportionately, Republicans use a mix of proportional representation and winner-take-all systems. Both parties use complex formulas to determine how many delegates come from each state and territory.

Second, there are unpledged delegates, who are party leaders and elected officials not committed to vote for any

### **primary elections**

An election held to determine the nominee from a particular party.

### **closed primary**

A primary election where only registered party members may vote for the party's nominee.

### **open primary**

A primary election where all voters (regardless of party membership) may vote for the party's nominee.



**super-delegates**

Party leaders and elected officials who become delegates to the national convention without having to run in primaries or caucuses.

**invisible primary**

Process by which candidates try to attract the support of key party leaders before the election begins.

particular candidates. Such delegates are often called **super-delegates**. To win the nomination, a candidate must have support in both camps, though super-delegates typically follow the lead of the pledged delegates. However, super-delegates can be crucial if the pledged delegate count is very close, as it was in 2008 between Barack Obama and Hillary Clinton, or in 2016 between Hillary Clinton and Bernie Sanders.

Reformers designed this system to weaken the power of party bosses. If delegates

chosen through primaries and caucuses effectively elect the candidate, party bosses have less power. Previously, party leaders chose the nominees in the proverbial smoke-filled rooms. Adlai Stevenson in 1952 and Hubert Humphrey in 1968 won the Democratic presidential nominations without even entering a single primary—party bosses chose them. Reformers wanted to weaken the power of the party bosses, so both parties designed reforms to reshape the selection of delegates in the 1970s and 1980s. These reforms were designed to give power to the people, rather than to party elites.

While these reforms did make the nomination process more democratic, they had an unintended consequence: they empowered activists. Candidates choose the people who will serve as their pledged delegates to the convention; they often choose people who are active in local politics and will be loyal to that candidate. Many of these people are activists, who are involved deeply with particular issues. Their views are not like the views of ordinary voters. Since 1972, scholars have done extensive surveys of convention delegates, and they have uncovered a consistent pattern of results: Democratic delegates are more liberal than Democratic voters, and Republican delegates are more conservative than Republican voters. Activists, unlike ordinary voters, are divided deeply.

The fact that these activists are more polarized pushes candidates to take more polarized positions to win and maintain their support.<sup>18</sup> By moving away from party bosses (who prioritize winning) to activists (who prioritize ideological purity), the current system pushes candidates away from the center. While activists want to nominate a candidate who is electable, they also want someone who takes the “correct” position on the issues, and hence their role in the process increases polarization.

This creates a tension for party leaders; they too want a candidate who will excite activists, but they also want a candidate who can win in November. To avoid nominating a candidate outside the mainstream, party leaders have worked to reassert themselves into the process. One way is by using super-delegates, which give party leaders and elected officials some say at the convention. Another is



Jeff J. Mitchell/Getty Images

**IMAGE 7-3** 2016 Republican nominee for President Donald Trump addresses his party's convention in Cleveland, Ohio.

through the so-called invisible primary. Candidates who hope to win elected office (especially the presidency) must survive the **invisible primary**, the process of attracting key party and interest group figures to your camp.<sup>19</sup> The idea is that the key party elites—the elected officials in the party, the state and local party chairpersons, key interest group leaders, party fundraisers, senior staffers, and so forth—are trying to settle on which candidate they think will be the best nominee. Then, they tilt resources toward that person so they have an advantage in the actual primaries and caucuses. Those resources are certainly money, but also include the best fundraisers and staffers, the key interest group leaders who will help supply volunteers, and so forth.

Of course, we must take care not to push this argument too far: Elites play a role in winnowing down the list of candidates, but what elites want is not always what happens. For instance, Hillary Clinton—the clear choice of many Democratic Party insiders headed into 2008—was not the eventual nominee that year. And Donald Trump would never even have been a serious contender for the 2016 Republican nomination had Republican Party insiders been making the choice; indeed, some argue that part of Trump's success was the failure of party leaders to coordinate on a candidate. Party leaders certainly try to influence the process, but the voters ultimately decide on the nominee.

## Helping Candidates Win Elections

Finally, once candidates have been recruited to run and have been nominated, the party has to help them win in the general election. First, parties help their candidates by giving them a party label. As we discuss shortly, voters overwhelmingly vote for the candidate who shares their party label; in recent years, more than 90% of Democratic (Republican) voters have supported the Democratic (Republican) nominee for president. This means that candidates typically can count on their party's supporters to vote for them if they show up to the polls.

But not all of a party's supporters get to the polls. The second method parties use to help candidates win elections is to conduct get-out-the-vote campaigns. In Chapter 8, we



John Moore/Getty Images

**IMAGE 7-4** Democratic volunteers conduct a voter registration drive during the 2012 election.

discuss the Obama campaign's groundbreaking efforts to mobilize volunteers to register and then turn out voters for President Obama. While other campaigns have not been as large or as sophisticated, conducting get-out-the-vote campaigns has become a key role played by parties and affiliated groups in recent years.

Third, parties also provide various services to their candidates. One important service is the type of get-out-the-vote drive discussed above, but parties also gather additional resources that they can share with candidates: lists of supporters, polling and other public opinion data, campaign staffers, and so forth. Parties are in service to their candidates.

Given the escalating cost of campaigns, money is perhaps the most important resource parties can provide candidates. While rules limit how much money a party can contribute directly to candidates (in federal elections, the national parties may only donate \$5,000 per candidate per election), these donations have value beyond the amount given. When a party gives a donation to a candidate, they are signaling to other donors—individuals, interest groups, political action committees, and so forth—that this is a high-quality candidate whom they should support. A donation from a party, while not much in dollar amounts, can be a powerful signal to other donors.<sup>20</sup>

## Parties as Organizations

Since political parties exist at the national, state, and local levels, you might suppose they are arranged like a big corporation—with a national board of directors giving orders to state managers, who in turn direct the activities of rank-and-file workers at the county and city level. For better or for worse, that is not the case. The various levels are independent of one another, and while they do coordinate for some activities, as we have seen, there is no kind of top-down, hierarchical system in place.

The national Democratic and Republican Parties are structured quite similarly. In both parties, ultimate authority is in the hands of the **national convention** that meets every four years to nominate a presidential candidate. Between

these conventions, party affairs are managed by a **national committee** made up of delegates from each state and territory. In Congress, each party has a **congressional campaign committee** that helps members of Congress running for reelection, or potential members running for an open seat or challenging a candidate from the opposition party. The day-to-day work of the party is managed by a full-time, paid **national chair** elected by the committee.

Beneath them are the state parties, and then the local parties. In every state, a Democratic and a Republican state party is organized under state law. Each consists typically of a state central committee, below which are county committees and sometimes city, town, or even precinct committees. The members of these committees are chosen in various ways—sometimes in primary elections, sometimes by conventions, sometimes by a building-block process whereby elected precinct or town committee members choose the members of county committees, who in turn choose state committee members.

## The National Parties

The national parties' main responsibility is to call the national party convention, which we discussed in detail previously. In between conventions, the national party serves primarily to represent the party in the media and to raise money. As mentioned, the party's fundraising apparatus is an important component of candidate success. And given changes in the political environment, parties now raise large sums of money. During the 2012 election cycle, the presidential candidates raised \$1.4 billion, but the parties raised \$1.6 billion.<sup>21</sup> Some of this party money is transferred to specific candidates, but other parts are distributed to state and local parties as well. The resurgent strength of the national party has also strengthened state and local parties, a point we return to below.<sup>22</sup>

## State and Local Parties

One of the difficulties in writing about state and local parties is that there is not just one state party, but 100 (one for each party in each of the 50 states); there are literally thousands of local parties, and no two are exactly alike. Some states and locales have strong parties, while others are weak and more a party in name than anything else.

But regardless of the exact form of state and local parties, they all have undergone a fundamental change from earlier generations. Before, state and local parties were

### **national convention**

A meeting of party delegates held every four years.

### **national committee**

Delegates who run party affairs between national conventions.

### **congressional campaign committee**

A party committee in Congress that provides funds to members and would-be members.

### **national chair**

Day-to-day party manager elected by the national committee.

**political machines**

A party organization that recruits members by dispensing patronage.

**partisan**

**identification** A voter's long-term, stable attachment to one of the political parties.

**partisanship** Another name for partisan identity.

often **political machines**, as we discussed earlier in the chapter. Political machines are party organizations that recruit their members using tangible incentives—money, political jobs, an opportunity to get favors from government—and are characterized by a high degree of leadership control over member activity. At one time, many local party organizations were machines, and the struggle over political jobs (patronage) was their members' chief concern. This was especially true in the 19th century, when groups like the Tammany Hall machine in

New York City famously played a key role in party politics. Such organizations doled out patronage jobs, and also acted as an informal welfare system—especially to new immigrant groups, giving them resources in exchange for political support.

While the machines were powerful, two factors gradually curtailed their power. First, a series of laws limited their power. Stricter voter registration laws reduced fraud, civil service reforms cut down the number of patronage jobs, and competitive bidding laws made it harder to award overpriced contracts to favored businesses. The Hatch Act (passed by Congress in 1939) made it illegal for federal civil service employees to take an active part in political management or political campaigns by serving as party officers, soliciting campaign funds, running for partisan office, working in a partisan campaign, endorsing partisan candidates, taking voters to the polls, counting ballots, circulating nominating petitions, or being delegates to a party convention. (They may still vote and make campaign contributions.)

Second, and far more important than these various progressive reforms, were changes among voters. As voters grew in education, income, and sophistication, they

depended less and less on the advice and leadership of local party officials. And as the federal government created a bureaucratic welfare system, the parties' informal welfare systems declined in value.

By the mid-1980s, the traditional party organization (one based on machine-style politics with strong, hierarchical organization) existed in only a few places.<sup>23</sup> In the intervening years, even those largely have died out, though vestiges survive in a few places—such as the Democratic machine in Cook County (Chicago), Illinois, or the Republican machine in Nassau County, New York.

Today, most state and local parties take a far different form. Without the staffing of the machines, they have come to be dominated by intense policy demanders, particularly those from social movements such as civil rights, peace, feminism, environmentalism, libertarianism, abortion, and so forth. The result is that in many places, the party has become a collection of people drawn from various social movements.<sup>24</sup> For a candidate to win the party's support, he or she often has to satisfy the "litmus test" demands of the ideological activists in the party. Democratic senator Barbara Mikulski put it this way: "The social movements are now our farm clubs." People who feel intensely about particular issues have replaced machines in most places.

In the years following the decline of the machine parties, many argued that state and local parties were effectively dead and could exert little influence. Yet more recent research suggests that today's parties are actually quite effective and powerful, albeit not to the same extent as political machines of the previous era. This is due largely to the influence of money. As the national parties have become more adept at fundraising, they and their donors have channeled money to state parties to help boost state parties; state parties themselves have become more adept fundraisers (and as we discuss in the next chapter, recent campaign finance rule changes have helped to make this shift possible).<sup>25</sup> States and local parties have used this increased money to build stronger infrastructures and provide more services to candidates.<sup>26</sup> As a result, today's state and local parties have become important political players.

## 7-4 Parties in the Electorate: Partisanship

Above we saw how parties are organized, how they recruit candidates, and so forth. Going back to our three-part categorization of parties from the beginning of the chapter, this described parties as organizations. But parties also exist as powerful symbols in the minds of voters. Voters have a **partisan identification**: a stable, long-term attachment to a political party (this is sometimes also called a voter's **partisanship**).

As we discussed in Chapter 6, two major factors help explain who is a Democrat and who is a Republican: parental partisanship, and the political environment as one comes of age politically. First, a voter's partisanship is heavily influenced by her parents' partisanship: Parents who are Republicans (typically) have children who are Republicans.<sup>27</sup> Second, the political environment as one comes of age politically also



**IMAGE 7-5** Ex-Senator George Washington Plunkitt of Tammany Hall explains machine politics from atop the bootblack stand in front of the New York County Courthouse around 1905.



powerfully shapes one's partisanship: Voters who came of age under Ronald Reagan and George H.W. Bush are more Republican than those who first experienced politics under Bill Clinton. Such partisanship is remarkably stable: Voters who were Democratic at age 18 tend to be Democratic at age 75, despite all that happened in between.<sup>28</sup> Partisanship is akin to being part of a like-minded group or political team.<sup>29</sup>

Of course, to say that partisanship is stable is not to say that it never changes. Partisanship is a stable identity, but in response to major events, it can—and does—change.<sup>30</sup> In response to the economic boom of the 1990s, voters moved toward the Democratic Party. In response to the 9/11 attacks and the ensuing focus on terrorism and national security—two issues where voters think Republicans are more competent than Democrats—more voters identified as Republicans.<sup>31</sup> After 2004, in the wake of the economic downturn and the unpopular war in Iraq, Americans moved away from the Republican Party.

If we look at the distribution of partisanship in the electorate over time, we see this same pattern: underlying stability with changes in response to major events. Figure 7-1 shows the rise and fall of partisan identification from the 1950s to today.

Several patterns stand out. First, in the 1950s, the Democrats had a substantial partisan advantage over Republicans; while almost 60 percent of the population identified as Democrats, only about 40 percent identified as Republicans. Today, that gap in identification is only about 10 percentage points, about half of what it was some 60 years ago. There are many reasons for this shift, but perhaps the most important one is the decline of the solid South. In the 1950s, nearly all white Southerners would have identified as Democrats, as they had done since the Civil War. As the parties moved apart on the issues, most notably civil rights, white Southerners gradually became Republicans.<sup>32</sup>

Second, and more strikingly, is the relatively modest number of Independents. In the popular press, we hear reports of how Independents are the largest group in the

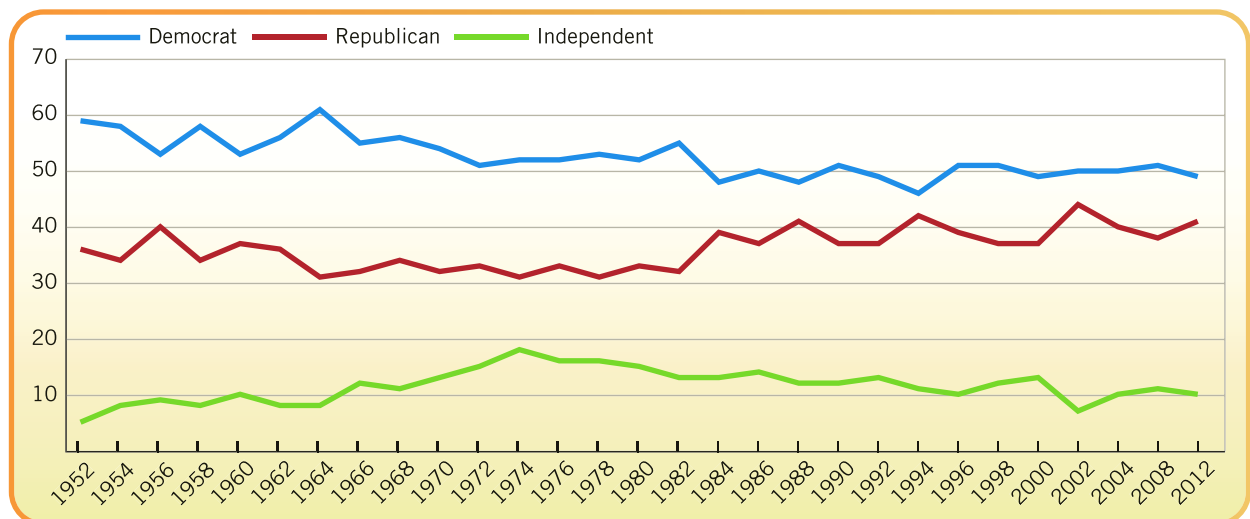
electorate, making up sometimes as much as 40 percent of Americans.<sup>33</sup> However, in Figure 7-1 there are considerably fewer Independents, and their numbers have declined from their high of approximately 20 percent in the early 1970s (they have stabilized in recent years to around 10 percent of the public).

What explains this difference? Here, we have grouped so-called Independent “leaners” in with the parties. When political scientists (and most major polling firms) ask someone about their partisanship, they first ask them if they are a Democrat, a Republican, or an Independent. If they identify as an Independent, they are asked whether they lean toward the Democratic or Republican parties. It turns out that almost all Independents lean toward one party or the other. In 2012, 44 percent of Americans initially identified as Independents. But when we asked them the follow-up leaner item, 16 percent leaned toward the Democrats, 18 percent leaned toward the Republicans, and the remaining 10 percent leaned toward neither party. Most Independents actually are closer to one party or the other.

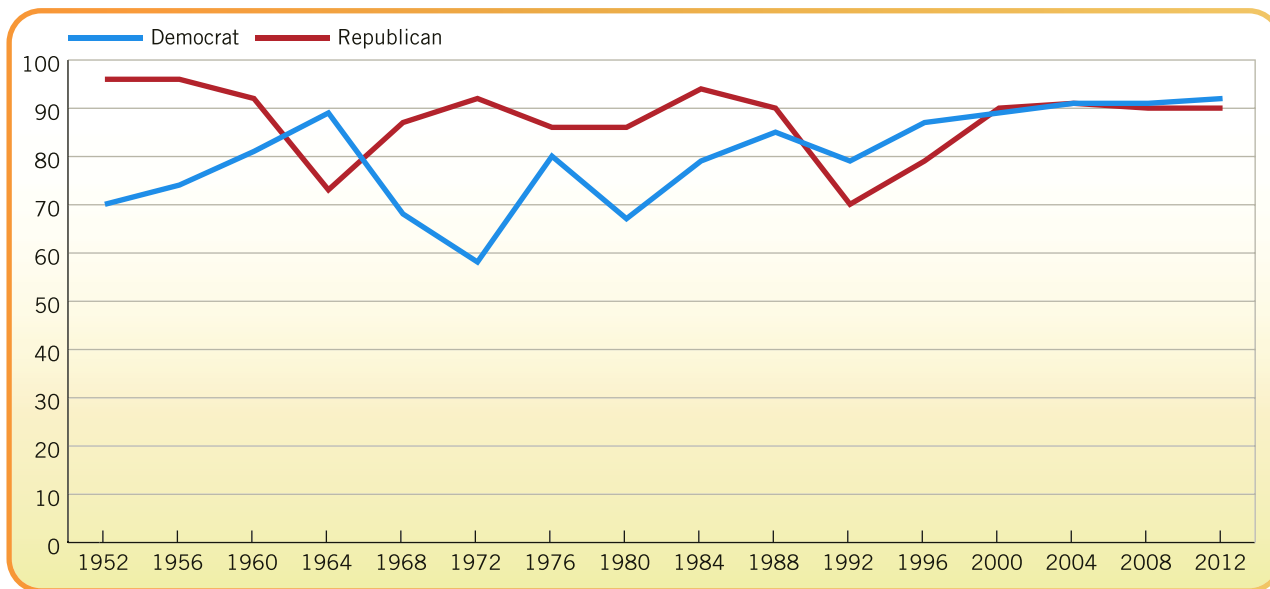
Why do we group such leaners with partisans? When political scientists study their behavior, these Independent leaners look a great deal like partisans in attitudes and vote choice.<sup>34</sup> If they look and act so much like partisans, why do Independent leaners call themselves Independent? For many, calling oneself an “Independent” seems to signal that they are moderate and not beholden to a particular party (even if they consistently vote for one party or the other). It reflects the positive valence of the word “Independent” as much as anything about their political beliefs.<sup>35</sup> It turns out that most Independents aren't really that Independent, so here we treat them as partisans.

If this partisanship was only a label that voters applied to themselves, and did not affect their behavior, we would not concern ourselves with it. But as political scientists have shown, a voter's partisanship shapes their attitudes and behavior powerfully. As we saw in the previous chapter,

**FIGURE 7-1** Voters' Partisanship, 1952–2012



**Source:** ANES Guide to Public Opinion and Electoral Behavior, 1952–2008; 2012 provided by author's analysis of NES Cumulative Data File, 1952–2012.

**FIGURE 7-2** Party Voting in Presidential Elections, 1952–2012

**Source:** Author's analysis of NES Cumulative Data File, 1952–2012.

### **two-party system**

An electoral system with two dominant parties that compete in national elections.

### **plurality system**

An electoral system in which the winner is the person who gets the most votes, even if he or she does not receive a majority; used in almost all American elections.

partisanship has a potent effect on one's opinions. This same power extends to vote choice as well. In Figure 7-2, we see that in recent years, partisanship has become an extremely powerful predictor of vote choice for president. For simplicity, we only put presidential vote here, but other votes—for Congress, governor, state legislator, and so on—would follow very similar patterns as well.

Until the 1990s, Republican voters were more loyal than Democratic voters, sometimes considerably more so.

But since the 1990s, both parties have been equally loyal, roughly, to their party's presidential nominee. Today, party voting hovers around 90 percent—that is, about 90 percent of Democrats support the Democratic nominee, and about 90 percent of Republicans support the Republican nominee for president (again, party loyalty levels for other offices would be similar). As we see in the next chapter, other factors such as the economy and issues also shape vote choice, but partisanship is the dominant factor.<sup>36</sup>

## 7-5 The Two-Party System

So far, we have seen how the U.S. political parties function, and how they differ from political parties elsewhere. But we have not really touched on the most striking difference between the United States and the rest of the world: America has a two-party system, while most other democracies have multiple parties. In the world at large a **two-party system**

is a rarity; by one estimate fewer than 30 nations have one.<sup>37</sup> Most European democracies are multiparty systems. We have only two parties with any chance of winning nationally, and these parties have been, over time, rather evenly balanced; between 1888 and 2012, the Republicans won 17 presidential elections and the Democrats 15. Furthermore, whenever one party has achieved a temporary ascendancy and its rival has been pronounced dead (as were the Democrats in the first third of the 20th century and the Republicans during the 1930s and the 1960s), the “dead” party has displayed remarkable powers of recuperation, coming back to win important victories.

At the state and congressional district levels, however, the parties are not evenly balanced. For a long time, the South was so heavily Democratic at all levels of government as to be a one-party area, while upper New England and the Dakotas were strongly Republican. All regions are more competitive today than once was the case.<sup>38</sup>

Scholars do not entirely agree on why the two-party system should be so permanent a feature of American political life, but two explanations are of major importance. The first has to do with the system of elections, the second with the distribution of public opinion.

Elections at every level of government are based on the plurality, winner-take-all method. The **plurality system** means that the winner gets the *most* votes, even if he or she does not get a *majority* of all votes cast, in all elections for representative, senator, governor, or president, and in almost all elections for state legislator, mayor, or city councilor. We are so familiar with this system that we sometimes forget there are other ways of running an election.

For example, one could require that the winner get a majority of the votes, thus producing runoff elections if nobody got a majority on the first try. France does this in choosing its national legislature. In the first election,

candidates for parliament who win an absolute majority of the votes cast are declared elected. A week later, remaining candidates who received at least one-eighth, but less than one-half of the vote go into a runoff election; those who then win an absolute majority are also declared elected.

The French method encourages many political parties to form, each hoping to win at least one-eighth of the vote in the first election and then to enter into an alliance with its ideologically nearest rival in order to win the runoff. In the United States, the plurality system means that a party must make all the alliances it can before the first election; there is no second chance. Hence, every party must be as broadly based as possible; a narrow, minor party has no hope of winning.

The winner-take-all feature of American elections has the same effect. Only one member of Congress is elected from each district. In many European countries, the elections are based on proportional representation. Each party submits a list of candidates for parliament, ranked in order of preference by the party leaders, and then the nation votes. A party winning 37 percent of the vote gets 37 percent of the seats in parliament; a party winning 2 percent of the vote gets 2 percent of the seats. Since even the smallest parties have a chance of winning something, minor parties have an incentive to organize.

The most dramatic example of the winner-take-all principle is the electoral college (see Chapter 10). In every state but Maine and Nebraska, the candidate who wins the most popular votes in a state wins *all* of that state's electoral votes. In 1992, for example, Bill Clinton won only 45 percent of the popular vote in Missouri, but he got all of Missouri's 11 electoral votes because his two rivals (George H. W. Bush and Ross Perot) each got fewer popular votes. Minor parties cannot compete under this system. Voters often are reluctant to "waste" their votes on a minor-party candidate who cannot win.

The presidency is the great prize of American politics; to win it, you must form a party with the broadest appeal possible. As a practical matter, this means there will be, in most cases, only two serious parties—one made up of those who support the party already in power, and the other made up of everybody else. Only one third party ever won the presidency—the Republican Party in 1860—and by then it had pretty much supplanted the Whig Party. No third party is likely to win, or even come close to winning, the presidency anytime soon.

The second explanation for the persistence of the two-party system is found in the opinions of the voters. While there have been periods of division in American politics, citizens still come together under the umbrella of the two major parties. There has not been a massive and persistent body of opinion that has rejected the prevailing economic system (and thus we have not had a Marxist party with mass appeal); there has not been an aristocracy or monarchy in our history (and thus there has been no party that has sought to restore aristocrats or monarchs to power). Churches and religion almost always have been regarded as matters of private choice that lie outside politics (and thus there has not been a party seeking to create or abolish special government privileges for one church or another). In some European

nations, the organization of the economy, the prerogatives of the monarchy, and the role of the church have been major issues with long and bloody histories. In these countries, these issues have been so divisive that they have helped prevent the formation of broad coalition parties.

But Americans have had other deep divisions—between white and black, for example, and between North and South—and yet the two-party system has endured. This suggests that our electoral procedures are of great importance. The winner-take-all, plurality election rules have made it useless for anyone to attempt to create an all-white or an all-black national party, except as an act of momentary defiance or in the hope of taking enough votes away from the two major parties to force the presidential election into the House of Representatives. (That may have been George Wallace's strategy in 1968.)

## Minor Parties

The electoral system may prevent minor parties from winning, but it does not prevent them from forming. Minor parties—usually called, erroneously, "third parties"—have been a permanent feature of American political life.

Apart from the Republicans—who quickly became a major party—the only minor parties to carry states and thus win electoral votes were one party of economic protest (the Populists, who carried five states in 1892) and several factional parties (most recently, the States' Rights Democrats in 1948 and the American Independent Party of George Wallace in 1968). Though factional parties may hope to cause the defeat of the party from which they split, they have not always been able to achieve this. Harry Truman was elected in 1948 despite the defections of both the leftist progressives, led by Henry Wallace, and the right-wing Dixiecrats, led by J. Strom Thurmond. In 1968, Hubert Humphrey likely would have lost even if George Wallace had not been in the race (Wallace voters would probably have switched to Nixon rather than to Humphrey, though of course one cannot be certain). On the other hand, it is quite possible that a Republican might have beaten Woodrow Wilson in 1912 if the Republican Party had not split in two (the regulars supporting William Howard Taft, the progressives supporting Theodore Roosevelt).

What is striking is not that we have had so many minor parties but that we have not had more. There have been several major political movements that did not produce a significant third party: the Civil Rights movement of the 1960s, the antiwar movement of the same decade, and, most important, the labor movement of the 20th century. African Americans were part of the Republican Party after the Civil War and part of the Democratic Party after the New Deal (even though the southern wing of that party for a long time kept them from voting and enjoying their full civil rights). The antiwar movement found candidates with whom it could identify within the Democratic Party (Eugene McCarthy, Robert F. Kennedy, George McGovern), even though it was a Democratic president, Lyndon B. Johnson, who was chiefly responsible for the U.S. commitment in Vietnam. After Johnson only narrowly won the 1968 New Hampshire primary, he withdrew



**interest group** An organization of people sharing a common interest or goal that seeks to influence public policy.

from the race. Unions have not tried to create a labor party; indeed, for a long time they were opposed to almost any kind of national political activity. Since labor became a major political force in the 1930s, the largest industrial unions have

been content to operate as a part—a very large part—of the Democratic Party.

One reason some potential sources of minor parties never formed such parties, in addition to the dim chance of success, is that the direct primary and the national convention made it possible for dissident elements of a major party to remain in the party and influence the choice of candidates and policies, unless they had become completely disaffected. The antiwar movement had a profound effect on the Democratic Conventions of 1968 and 1972. African Americans have played a growing role in the Democratic Party, especially with the candidacy of Jesse Jackson in 1984 and 1988 and Barack Obama in 2008 and 2012. Only in 1972 did the unions feel that the Democrats nominated a presidential candidate (McGovern) unacceptable to them.

The impact of minor parties on American politics is hard to judge. One bit of conventional wisdom holds that minor parties develop ideas that the major parties later come to adopt. The Socialist Party, for example, supposedly called for major social and economic policies that the Democrats under Roosevelt later embraced and termed the New Deal. It is possible the Democrats did steal the thunder of the Socialists, but it hardly seems likely that they did it because the Socialists had proposed these things or proved them popular. (In 1932, the Socialists received only 2 percent of the vote and in 1936 less than one-half of 1 percent.) Roosevelt probably adopted the policies in part because he thought them correct, and in part because dissident elements within his own party—leaders such as Huey Long of Louisiana—were threatening to bolt the Democratic Party if it did not move to the left. The efforts of interest groups such as the Anti-Saloon League were a greater factor in the adoption of Prohibition than its endorsement by the Prohibition Party.

The minor parties that probably have had the greatest influence on public policy have been the factional parties. Mugwumps and liberal Republicans, by bolting the regular party, may have made that party more sensitive to the issue of civil service reform; the Bull Moose and La Follette Progressive Parties probably helped encourage the major parties to pay more attention to issues of business regulation and party reform; the Dixiecrat and Wallace movements probably strengthened the hands of those who wished to go slow on desegregation. The threat of a factional split is a risk that both major parties must face, and it is in the efforts made by each to avoid such splits that one finds the greatest impact of minor parties, or at least that was the case in the 20th century.

The Tea Party movement that has evolved in recent years is not a single national party, but it shares characteristics with minor parties. Tea Party activists have been active in recent elections, and have helped to defeat some long-standing Republican elected officials—such as former House majority



**IMAGE 7-6** Tea Party activists protest in Washington, D.C., against the Internal Revenue Service's extra scrutiny of their organizations.

leader Eric Cantor, who lost in a 2014 primary election. While the movement is diverse, many of its members share a set of core values focused on reducing taxes, government spending, and the federal debt. Whether the Tea Party will continue to influence the Republican Party into the future remains to be seen.

## 7-6 The Rise of Interest Groups

Political parties are not the only organization trying to influence government policy; so do interest groups. An **interest group** is an organization of people sharing a common interest or goal that seeks to influence public policy. Such groups are as old as the republic itself; the earliest in America date back to before the nation was born, when citizens organized to agitate for American independence. Similar movements—focusing on abolition, women's suffrage, worker's rights and other causes—arose throughout the 19th and 20th centuries. But the number of interest groups has grown rapidly since 1960, and the number of interest groups that have lobbyists working full time in Washington has reached new highs in just the last decade. What explains the growth of such groups?

At least four factors help explain the rise of interest groups. The first consists of broad economic developments that create new interests and redefine old ones. Farmers had little reason to become organized for political activity so long as most of them consumed what they produced. The importance of regular political activity became evident only after most farmers began to produce cash crops for sale in markets that were unstable or affected by forces—the weather, the railroads, foreign competition—that those farmers could not control.

Second, government policy itself helps to create interest groups. Wars create veterans, who in turn demand pensions and other benefits. The first large veterans' organization, the Grand Army of the Republic, was made up of Union veterans of the Civil War. By the 1920s, these men were receiving about a quarter of a billion dollars a year from the government, and naturally they created organizations to watch over the distribution of this money.

Third, political organizations do not emerge automatically, even when government policy permits them and social circumstances seem to require them. Somebody must exercise leadership, often at substantial personal cost. These organizational entrepreneurs are found in greater numbers at certain times than at others. Often they are young, caught up in a social movement, drawn to the need for change, and inspired by some political or religious doctrine.

Antislavery organizations were created in the 1830s and 1840s by enthusiastic young people influenced by a religious revival sweeping the country. The period from 1890 to 1920, when so many national organizations were created, was a time when the college-educated middle class was growing rapidly; the number of men and women who received college degrees each year tripled between 1890 and 1920.<sup>39</sup> During this era, natural science and fundamentalist Christianity were locked in a bitter contest, with the Gospels and Darwinism offering competing ideas about personal salvation and social progress.

Finally, the more government does, the more interest groups will arise or expand and try to influence public policy. Most Washington offices representing corporations, labor unions, and trade and professional associations were established before 1960—in some cases many decades before—because it was during the 1930s or even earlier that the government began making policies important to business and labor. The great majority of “public-interest” lobbies (those concerned with the environment or consumer protection), social welfare associations, and organizations concerned with civil rights, older adults, and the disabled established offices in Washington after major new federal laws in these respective areas were enacted.

## 7-7 Interest Groups and Social Movements

Many of the country’s most famous interest groups have arisen out of social movements. A **social movement** is a widely shared demand for change in some aspect of the

social or political order. The Civil Rights movement of the 1960s was such an event, as was the environmentalist movement of the 1970s.

A social movement need not have liberal goals. In the 19th century, for example, there were various nativist movements that sought to reduce immigration to this country or to keep Catholics or Masons out of public office. Broad-based religious revivals are social movements. In recent years, the conservative Tea Party movement, which has taken hold around issues like restraining government growth, has played a role in both local and national elections.<sup>40</sup>

No one is quite certain why social movements arise. At one moment, people are largely indifferent to some issue; at another moment, many of these same people care passionately about religion, civil rights, immigration, or conservation. A social movement may be triggered by a disaster (an oil spill on the Santa Barbara beaches helped launch the environmental movement), the dramatic and widely publicized activities of a few leaders (lunch counter sit-ins helped stimulate the Civil Rights movement), or the coming of age of a new generation that takes up a cause advocated by eloquent writers, teachers, or evangelists.

But regardless of how they start, social movements can be hard to sustain. Social movements—and many interest groups—advocate for public goods. A **public good** is something of value that all individuals share, regardless of whether or not they contribute to it. Items such as clear air, clean water, and national defense are all examples of public goods. For example, if an environmental movement secures passage of a law to improve air quality, then the movement cannot restrict the improved air quality to their own members—all members of society benefit. Therefore, even if an individual does not join the group, she will benefit from

**social movement** A widely shared demand for change in some aspect of the social or political order.

**public good** Something of value that all individuals share, whether or not they contribute to it (such as clean air or water).



### CONSTITUTIONAL CONNECTIONS

#### A “Faction” or “Special Interest”?

While the Constitution does not discuss interest groups explicitly (though the First Amendment does guarantee their rights of assembly and speech), the Framers were very concerned about “factions” undermining the new republic. James Madison warned in *Federalist* 10 of the dangers of factions, and argued that republican (i.e., representative) democracy would control the effects of factions through elected officials and a large republic, in which groups would compete to influence policy, forcing compromise and preventing the domination of any single group.

But what is a faction? Madison says any individual or group, whether a minority or majority of the whole, is a faction if

it has interests that are opposed to the “permanent and aggregate interests of the community.” Who defines those interests? The Framers thought our elected officials had the knowledge and expertise to do so, and those officials depend on interest groups for many resources, including information, campaign funds, and votes. A “faction” for one person may be a “special interest” for another. Madison’s point about the need to limit the influence of factions remains true, but those groups also play an integral part in American democracy.

**free rider problem**

The tendency of individuals to avoid contributing to public goods.

**material incentives**

Money or things valued in monetary terms.

**solidary incentives**

The social rewards (sense of pleasure, status, or companionship) that lead people to join political organizations.

**purposive incentive**

A benefit that comes from serving a cause or principle.

the cleaner air. This creates the **free rider problem**; individuals will have an incentive to not join social movements, and just reap the rewards produced by the movement (hence, non-members are said to “free ride” on the efforts of group members). To overcome this problem, social movements and interest groups seeking public goods (as most do) must offer their members incentives to get them to join.

Groups can offer their members three different types of incentives to overcome the free-rider problem: material, purposive, and solidary.

**Material incentives** benefit members financially. For example, the American Automobile Association (AAA) gives its members discounts at automobile insurance and at many

hotels and restaurants. **Solidary incentives** are the sense of pleasure, status, or companionship that arises out of meeting in small groups. Groups like the Sierra Club have important political aims (largely focused on the environment), but they also offer their members the ability to meet with other like-minded people who enjoy the outdoors. For many members, the political goals are secondary to the camaraderie and enjoyment they get out of associating with similar individuals. Finally, **purposive incentives** focus on the goal or purpose of the organization. Groups like NARAL Pro-Choice America or Operation Rescue often focus on purposive incentives, and their members participate because they believe in the cause. And of course, many groups combine all three types of incentives to motivate their members to join the group.

## 7-8 The Activities of Interest Groups

Size and wealth are no longer accurate measures of an interest group's influence—if indeed they ever were. Depending on the issue, the key to political influence may be the ability to generate a dramatic newspaper headline, mobilize a big letter-writing campaign, stage a protest demonstration, file a suit in federal court to block (or compel) some government action, or supply information to key legislators. All of these things require organization, but few of them require big or expensive organizations.

### Lobbying and Providing Information

Of all these tactics, the single most important one—in the eyes of virtually every lobbyist and every academic student of lobbying—is supplying credible information. Indeed, if one were to ask what is the core of lobbying and interest-group influence, it would be providing information. Information is valuable because, to busy legislators and bureaucrats, it is in short supply. Legislators in particular must take positions on a staggering number of issues about which they cannot possibly become experts.

Much of the information lobbyists and their affiliated interest groups provide is about the consequences of a particular piece of legislation—either the policy consequences (How will this bill affect health-care policy?) or the political consequences (How will this bill affect my next reelection campaign?).<sup>41</sup> Because legislators want both to craft good policy and win reelection (see Chapter 9), both types of information are highly valuable.

The kind of information lobbyists provide is not easily accessible via the Internet or other means; if it was, lobbying would not be necessary. Instead, it is highly specialized, often quite technical information, which only someone with a strong stake in an issue would gather.<sup>42</sup> Lobbyists, for the most part, are not flamboyant, party-giving arm-twisters; they are specialists who gather information (favorable to their clients, naturally) and present it in as organized, persuasive, and factual a manner as possible.

All lobbyists no doubt exaggerate, but few can afford to misrepresent the facts or mislead a legislator, and for a very simple reason: Almost every lobbyist must develop and maintain the confidence of a legislator over the long term, with an eye on tomorrow's issues as well as today's.<sup>43</sup> Because lobbyists want to develop long-term relationships with legislators, they have a strong incentive to be at least mostly truthful.

Lobbying has become ubiquitous in American politics. A vast panoply of groups lobby: interest groups ranging from the National Rifle Association to the American Automobile Association, along with unions, businesses, and other branches of government (recall our discussion of the inter-governmental lobby in Chapter 3). It may even surprise you to find that universities—from major private universities such as Harvard and Yale, to state universities like the University of Texas and the University of California, to for-profit colleges—also lobby the federal government. These schools lobby



Adam Weiz/Alamy

**IMAGE 7-7** Environmental activists deliver anti-fracking petitions to government officials.



about regulations governing student financial aid, education policy, and research funding.

While all of these groups lobby, the dominant players in the lobbying market are business organizations. One study found that business groups and trade associations account for approximately three-quarters of all lobbying activity.<sup>44</sup> Why? Primarily because they are seeking private goods—that is, a particular benefit only for that firm. For example, a particular defense contractor (say) might want the Department of Defense to purchase more of its jets for the Air Force. If that firm does not lobby the government, then they will be less likely to receive the contract, which explains why so many firms lobby for these types of benefits. As we discussed earlier, many other groups lobby for public goods, and so suffer from the free rider problem. But because business groups are seeking private benefits, they do not face the free rider problem, and hence they have a strong incentive to lobby. Much lobbying is therefore business lobbying.

When most people think of lobbying, they think of lobbying on highly salient issues, such as Obamacare, immigration reform, gun control, or the Keystone XL pipeline. Lobbying certainly happens on these sorts of highly visible issues, but it is not the norm. A careful study of lobbying efforts found that lobbying was extremely skewed: Hundreds of lobbyists were active on a handful of significant bills, but on most issues, only one or two lobbyists were active.<sup>45</sup> So, while we often equate lobbying with lobbying on major legislation, this is not what most lobbying looks like. Typical lobbying is a small, niche effort to change some small area of government policy that is only relevant to a few actors.

Furthermore, these two types of lobbying look very different. On high-salience bills with lobbyists on both sides of the issue, lobbying is unlikely to affect the outcome very much. Advocates for both sides make their case to legislators, and their lobbying is only one of many factors in how a legislator decides. Lobbyists can of course affect the outcome, but they are constrained by these other factors. On these salient issues, other factors—most notably, a member's own ideology and what his or her constituents want—are likely to be decisive.

However, on more narrow niche bills, far from the spotlight, lobbyists may be more influential. On these narrow issues, typically only one side lobbies, and this will be the side with more resources and advantages. Many of these issues are examples of client politics, such as when a firm tries to obtain a particularistic exemption from a regulation or tariff (recall from Chapter 1 that client politics involves when a group seeks concentrated benefits at the expense of a diffuse majority). No one lobbies for those bearing the dispersed costs in these cases, but there are lobbyists for the concentrated benefits. We cannot say for certain that lobbyists have undue influence here, but it certainly suggests that lobbyists are likely more powerful on these narrow issues.

Beyond lobbying, groups can also provide another type of valuable information: political cues. A **political cue** is a signal telling the official what values are at stake in an issue—who is for, and who is against, a proposal—and how that issue fits into his or her own set of political

beliefs. Some legislators feel comfortable when they are on the liberal side of an issue, and others feel comfortable when they are on the conservative side, especially when they are not familiar with the details of the issue. A liberal legislator will look to see whether the AFL-CIO, the NAACP, the Americans for Democratic Action, the Farmers' Union, and various consumer organizations favor a proposal; if so, that is often all he or she has to know.

If these liberal groups are split, then the legislator will worry about the matter and try to look into it more closely. Similarly, a conservative legislator will feel comfortable taking a stand on an issue if the Chamber of Commerce, the National Rifle Association, the American Medical Association, various business associations, and Americans Conservative Union are in agreement about it; he or she will feel less comfortable if such conservative groups are divided. As a result of this process, lobbyists often work together in informal coalitions based on general political ideology.

One important way in which these cues are made known is by **ratings** that interest groups make of legislators. These are compiled regularly by dozens of interest groups; some of the most prominent include those by the AFL-CIO (on who is pro-labor), by the Americans for Democratic Action (on who is liberal), by the National Taxpayers Union (on who is anti-tax), by the Consumer Federation of America (on who is pro-consumer), and by the League of Conservation Voters (on who is pro-environment). These ratings are designed to generate public support for, or opposition to, various legislators. They can be helpful sources of information to both legislators and their constituents.

**political cue** A signal telling a legislator what values are at stake in a vote, and how that issue fits into his or her own political views on party agenda.

**ratings** Assessments of a representative's voting record on issues important to an interest group.

## Public Support: The Rise of the New Politics

Once upon a time, when the government was small, Congress was less individualistic, and television was nonexistent, lobbyists mainly used an *insider strategy*: they worked closely with a few key members of Congress, meeting them privately to exchange information and (sometimes) favors. Matters of mutual interest could be discussed at a leisurely pace, over dinner or while playing golf. Public opinion was important on some highly visible issues, but there were not many of these.

Following an insider strategy is still valuable, but increasingly interest groups have turned to an *outsider strategy*. The newly individualistic nature of Congress has made this tactic useful, and modern technology has made it possible. Radio, fax machines, and the Internet can now get news out almost immediately. Satellite television can be used to link interested citizens in various locations across the country. Toll-free phone numbers can be publicized, enabling voters to call the offices of their members of Congress without charge. Public opinion polls can be done by telephone,

**grassroots lobbying**

Using the general public (rather than lobbyists) to contact government officials about a public policy.

**political action committee (PAC)**

A committee set up by a corporation, labor union, or interest group that raises and spends campaign money from voluntary donations.

virtually overnight, to measure (and help generate) support for or opposition to proposed legislation. Mail can be directed by computers to people already known to have an interest in a particular matter.

This kind of **grassroots lobbying** is central to the outsider strategy. It is designed to generate public pressure directly on government officials. The “public” that exerts this pressure is not every voter or even most voters; it is that part of the public (sometimes called an *issue public*) affected directly by, or concerned deeply with, a

government policy. What modern technology has made possible is the overnight mobilization of specific issue publics.

Not every issue lends itself to an outsider strategy. It is hard to get many people excited about, for example, complex tax legislation affecting only a few firms. But as the government does more and more, and its policies affect more and more people, many more will join in grassroots lobbying efforts over matters such as abortion, Medicare, Social Security, environmental protection, gay marriage, and affirmative action. Grassroots lobbying is most common on these sorts of highly salient issues that have the potential to mobilize and appeal to a broad swath of the public.<sup>46</sup> For example, in 2010, both sides of the debate over Obamacare made extensive use of grassroots lobbying.<sup>47</sup>

## Money and PACs

Contrary to popular suspicions, money is probably one of the less effective methods for interest groups to advance their causes. That was not always the case. Only a few decades ago, powerful interests used their bulging wallets to buy influence in Congress. The passage of campaign finance legislation in the early 1970s changed that.

The laws had two effects. First, they sharply restricted the amount any interest could give to a candidate for federal office (see Chapter 8). Second, they made legal the creation by organizations of political action committees that could make political contributions.

**Political action committees (PACs)** are committees set up by corporations, labor unions, or interest groups that raise and spend campaign money from voluntary donations. There are strict limits on how much a member can contribute and how much the PAC can give to candidates and parties; we summarize some of the key rules governing PACs in Table 7-1 below.

Once PACs became legal, they grew rapidly in numbers. When they were created in the 1970s, initially there were only a few hundred PACs. Today there are nearly 5,900 PACs, up from just over 4,000 in 2004 (over 40 percent growth in little more than a decade).<sup>48</sup> Figure 7-3 shows this dramatic increase in the number of PACs over time.

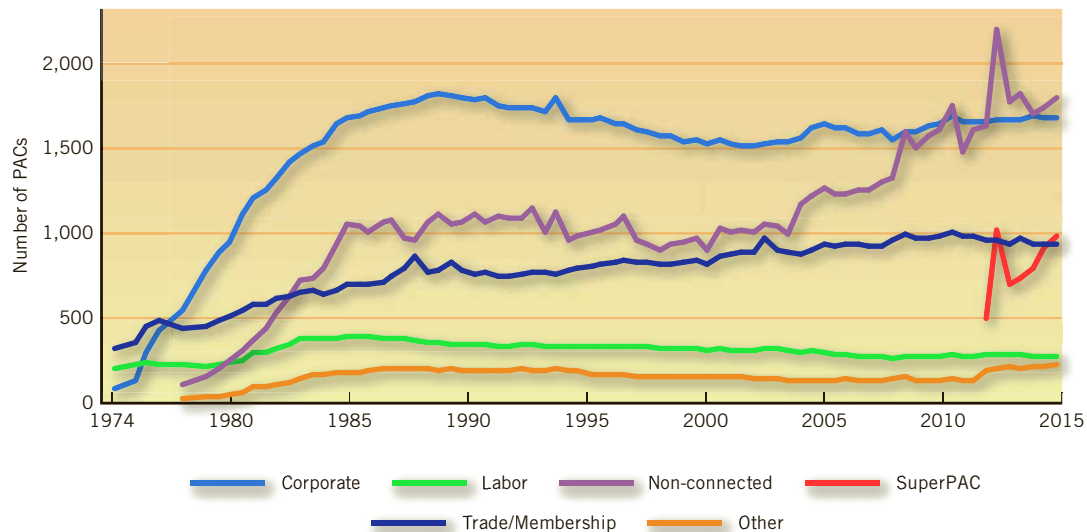
**TABLE 7-1 Political Action Committees (PACs)**

<b>Can be formed by:</b>
<ul style="list-style-type: none"> <li>• Business firms</li> <li>• Labor unions</li> <li>• Trade associations</li> <li>• Ideological organizations</li> </ul>
<b>Must have at least 50 individual members:</b>
<ul style="list-style-type: none"> <li>• Each member can give up to \$5,000 per election</li> <li>• The sponsoring firm, union, association, or ideological group cannot contribute money</li> </ul>
<b>A PAC that contributes to at least five candidates may contribute:</b>
<ul style="list-style-type: none"> <li>• \$5,000 to any federal candidate in any election</li> <li>• \$15,000 to any national political party</li> <li>• \$5,000 to any state or local party</li> </ul>
(Nonmulticandidate PACs have different contribution limits.)
<b>Where the money goes:</b>
<ul style="list-style-type: none"> <li>• Business PACs give slightly more to the majority party</li> <li>• Labor unions give more than 90 percent to Democrats</li> <li>• Ideological PACs give to Democrats and Republicans in about equal amounts</li> </ul>

There are two basic types of PACs. There are connected PACs, which are affiliated with a corporation, union, or group. They are called “connected PACs” because they are connected to a particular organization or firm, and can only solicit voluntary contributions from individuals associated with said organization. These connected PACs make up the majority of PACs, and are what most people think of when they think of a PAC.

But in recent years, there has been rapid growth in two other types of PACs: non-connected PACs (most notably, leadership PACs) and so-called Super PACs. Non-connected PACs are organized around particular ideological views or a particular personality, such as a prominent member of Congress. Unlike other PACs, non-connected PACs can solicit contributions from the general public. Perhaps the most common type of non-connected PAC is a leadership PAC: a PAC headed by a member of Congress who raises money for other candidates. Among the best-known leadership PACs is the one formed by former House Speaker Nancy Pelosi to help fund Democratic candidates (Team Majority).

Super PACs, more formally known as “independent expenditure-only committees,” can engage in certain types of political activity, but may not coordinate with candidates or political party leaders. So these Super PACs spend money in electoral campaigns, but they do so independently of the candidate, his/her staff, and the national, state, and local parties. Among the best-known super PACs is American Crossroads, launched to assist Republican candidates by Karl Rove, former White House aide to President George W. Bush. We discuss their effects, if any, in the next chapter on elections.

**FIGURE 7-3** Growth of PACs, 1974–2015

**Source:** Federal Election Commission, <http://www.fec.gov/press/resources/paccount.shtml>, Accessed 29 December 2015

Some people worry that the existence of all this political money has resulted in “the finest Congress that money can buy,” as the late Senator Edward Kennedy put it. More likely, the increase in the number of PACs has had just the opposite effect. The reason is simple: With PACs so numerous and so easy to form, it is now probable that money will be available on every side of almost every conceivable issue. As a result, members of Congress can take money and still decide for themselves how to vote. There is not much scholarly evidence that money buys votes in Congress.

Indeed, some members of Congress tell PACs what to do rather than take orders from them. Members will frequently inform PACs that they “expect” money from them; grumbling PAC officials feel they have no choice but to contribute for fear of alienating the members.

In the 2013–2014 election cycle, PACs gave more than \$333 million to candidates running for the House and Senate. While these figures are large, they need to be put into the proper perspective. First, individuals give more money in total than PACs do, so PACs are not the dominant figure in campaign finance that many imagine them to be.<sup>49</sup> Second, the average PAC contribution to a candidate is rather small, on the order of a few hundred dollars; the popular image of rich PACs stuffing huge sums into political campaigns and thereby buying the attention and possibly the favors of the grateful candidates is an exaggeration.

The typical PAC tries to support a large number of candidates with relatively modest donations. They are more likely to support incumbents rather than challengers, and typically they also give slightly more money to the majority party (though labor unions give almost exclusively to Democrats, and a few business PACs give predominantly to Republicans). This pattern reflects the fact that most PAC contributions are a means of gaining access to members.<sup>50</sup> Members have

busy schedules, and receive far more requests for meetings than they could ever possibly grant. A PAC contribution is a way for the organization to get its foot in the door; when they call, the member will be more likely to take their call and meet with them if they have given him or her money.<sup>51</sup>

While there is considerable evidence that contributions provide access, there is little evidence that PAC donations (or other types of political money) affect how legislators vote.<sup>52</sup> On most issues, a legislator’s vote is primarily explained by their general party and ideology, as well as their constituents’ preferences; factors like the amount of PAC money are very minor considerations. This also reflects the fact that PACs tend to donate more to their friends than to fence-sitters or their opponents—PAC contributions are a form of subsidy to friendly legislators.<sup>53</sup> The PAC contribution is a way to help reelect a member with whom the organization has a good



**IMAGE 7-8** Citizens meet with members of Congress to lobby for particular programs.



relationship. For example, many defense contractors give their largest contributions to members of Congress who have factories located in their districts. If we see that those members supported a bill to award a contract for a new weapons system to that contractor, it was likely not the PAC donation that drove their vote; it was most likely the prospect of new jobs in their district. In the end, a PAC donation is almost certainly not enough to sway a member of Congress's vote one way or the other.

If interest-group money makes a difference at all, it probably makes it on certain kinds of issues more than others. Much as with lobbying, interest-group money probably matters most on narrow issues that are best characterized as client politics (concentrated benefits but dispersed costs). While PAC contributions do not seem to matter much in the aggregate, they may well matter more on these sorts of narrow policies.<sup>54</sup>

## The “Revolving Door”

Every year, hundreds of people leave important jobs in the federal government to take more lucrative positions in private industry. Some go to work as lobbyists, others as consultants to business, still others as key executives in corporations, foundations, and universities. Those with the most power—committee chairs, party leaders, and so forth—are the most likely to work as lobbyists or in other private-sector jobs.<sup>55</sup>

Many people worry that this “revolving door” may give private interests a way of influencing government decisions improperly. If a federal official uses his or her government position to do something for a corporation in exchange for a cushy job after leaving government, or if a person who has left government uses his or her personal contacts in Washington to get favors for private parties, then the public interest may suffer.

Over the years, more than a few scandals have emerged concerning corrupt dealings between federal department officials and industry executives. Many have involved contractors or their consultants bribing procurement officials. Far more common, however, have been major breakdowns in the procurement process itself. For example, in 2006, the Department of Homeland Security revealed the results from an internal audit, which showed that the organization was not always following federal rules regarding contracting.<sup>56</sup> However, while there are various examples like these, we lack full and systematic data on the problem more broadly, so it is difficult to draw firm conclusions about it more generally.

## Civil Disobedience

Public displays and disruptive tactics—protest marches, sit-ins, picketing, and violence—have always been a part of American politics. Indeed, they were among the favorite tactics of the American colonists seeking independence in 1776.

Both ends of the political spectrum have used display, disruption, and violence. On the left, feminists, gay rights supporters, antislavery agitators, coal miners, auto-workers, African Americans, antinuclear power groups, public housing tenants, the American Indian Movement, the Students for a Democratic Society, and the Weather Underground have



**IMAGE 7-9** Same-sex marriage supporters celebrate after the Supreme Court ruled in their favor in 2015.

created “trouble” ranging from peaceful sit-ins at segregated lunch counters to bombings and shootings. On the right, the Ku Klux Klan has used terror, intimidation, and murder; parents opposed to forced busing of schoolchildren have demonstrated; business firms have used strong-arm squads against workers; right-to-life groups have blockaded abortion clinics; and an endless array of “anti-” groups (anti-Catholics, anti-Masons, anti-Jews, anti-immigrants, anti-saloons, anti-blacks, anti-protesters, and probably even anti-antis) have taken their disruptive turns on stage. More recently, the Tea Party and affiliated groups have used protests and rallies to help spread their message. These various activities are not morally the same—a sit-in demonstration is quite different from a lynching—but politically they constitute a similar problem for a government official.

The civil rights and antiwar movements of the 1960s gave experience in these methods to thousands of young people and persuaded others of the effectiveness of such methods under certain conditions. Though these movements have abated or disappeared, their veterans and emulators have put such tactics to new uses—trying to block the construction of a nuclear power plant, for example, or occupying the office of a cabinet secretary to obtain concessions for a particular group. As a result, such techniques are common today on both the left and the right.

## Which Groups and Strategies Are Most Effective?

Reviewing the various strategies interest groups use to influence the policy process, one might naturally ask two questions about interest-group power. First, which strategies are most effective? And second, which interest groups are most influential?

Consider the question of strategy first. Unfortunately, this kind of question does not have an easy answer. The best strategy depends on the group and the issue in question. For some issues—especially a highly salient one that would generate significant public support—a grassroots lobbying strategy and a media campaign would be most effective. For other issues, especially more niche client politics issues,

an insider lobbying campaign of key legislators would be the most efficacious strategy. Furthermore, on many issues, the best strategy isn't any one choice but a combination of choices: it is not grassroots or insider lobbying, it is both.<sup>57</sup> For example, the Civil Rights movement used not only protests and civil disobedience, but a strategic series of lawsuits, as well as both insider and grassroots lobbying. Most groups use many of the tactics described in this section.

Can we say, then, which groups are most effective? Such a question is, at its core, effectively impossible to answer, as different groups will be influential for different reasons. However, one common thread connecting many of these groups is that they have the power to demonstrate clear electoral consequences to opposing their policies. For example, one reason why the National Rifle Association (NRA) has long been seen as a powerhouse interest group is that NRA members are highly politically engaged, and will vote against—and campaign against—members who oppose their policy positions.<sup>58</sup> Similarly, the AARP is also seen widely as powerful because senior citizens, its core demographic, are highly politically engaged. We can say these groups are “important” because they represent large, geographically dispersed constituencies who can impose electoral costs on members. In short, one key part of “importance” or “influence” is being able to generate electoral reward or punishment for members.

Furthermore, as we have discussed throughout the chapter, the political context also matters. Interest groups are most effective when they pursue issues best characterized as client politics. Groups that advocate for change on broad-based entrepreneurial or majoritarian politics (things like regulating the environment) face a more uphill battle because of the nature of the issue.

This highlights an important truth about American politics. Many assume that money determines policy outcomes, but the logic above shows that this is not really correct: organization, political consequences, and political context matter just as much, if not more. Studies find that the side with the most money (or who spends the most money) is only weakly correlated with policy success, and a majority of lobbying efforts—even those from well-connected, high-profile groups—fail.<sup>59</sup> If all it took to change the status quo was money, then neither tobacco nor oil drilling would be regulated at all (instead, both are heavily regulated). Business interests and their wealthy proponents often get what they want, for reasons we discussed above. But to say that they *always* get what they want in a pluralistic system like ours would be a serious mistake. To understand interest-group success and failure, we need to consider organizations and the political context in which groups operate.

## 7-9 Regulating Interest Groups

Interest-group activity is a form of political speech protected by the First Amendment to the Constitution: it cannot lawfully be abolished or even much curtailed. In 1946, Congress passed the Federal Regulation of Lobbying Act, which requires groups and individuals seeking to influence legislation to register with the secretary of the Senate and the

clerk of the House, and to file quarterly financial reports. The Supreme Court upheld the law but restricted its application to lobbying efforts involving direct contacts with members of Congress.<sup>60</sup> More general “grassroots” interest-group activity may not be restricted by the government. The 1946 law had little practical effect. Not all lobbyists took the trouble to register, and there was no guarantee that the financial statements were accurate. There was no staff in charge of enforcing the law.

In late 1995, after years of growing popular dissatisfaction with Congress—and prompted in large measure by the (exaggerated) view that legislators were the pawns of powerful special interests—Congress passed a bill unanimously that tightened up the registration and disclosure requirements. Signed by the president, the law restated the obligation of lobbyists to register with the House and Senate, but it broadened the definition of a lobbyist to include the following:

- People who spend at least 20 percent of their time lobbying
- People who are paid at least \$5,000 in any six-month period to lobby
- Corporations and other groups that spend more than \$20,000 in any six-month period on their own lobbying staffs

The law covered people and groups who lobbied the executive branch and congressional staffers as well as elected members of Congress, and it included law firms that represent clients before the government. Twice a year, all registered lobbyists were required to report the names of their clients, their income and expenditures, and the issues on which they worked. The registration and reporting requirements did not, however, extend to grassroots lobbying. Nor was any new enforcement organization created, although congressional officials could refer violations to the Justice Department for investigation. Fines for breaking the law could amount to \$50,000. In addition, the law barred tax-exempt, nonprofit advocacy groups that lobby from getting federal grants.

Just as the Republicans moved expeditiously to pass new regulations on interest groups and lobbying when they regained majorities in Congress in the November 1994 elections, the Democrats' first order of business after retaking Congress in the November 2006 elections was to adopt sweeping reforms. Beginning March 1, 2007, many new regulations took effect, including the following:

- No gifts of any value from registered lobbyists or firms that employ lobbyists
- No reimbursement for travel costs from registered lobbyists or firms that employ lobbyists
- No reimbursement for travel costs, no matter the source, if the trip is in any part organized or requested by a registered lobbyist or firm that employs lobbyists

Strictly speaking, these and related new rules mean that a House member cannot go on a “fact-finding” trip to a local site or a foreign country and have anyone associated with

lobbying arrange to pay for it. Even people who are not themselves registered lobbyists, but who work for a lobbying firm, are not permitted to take members of Congress to lunch or give them any other “thing of value,” no matter how small.

But if past experience is any guide, “strictly speaking” is not how the rules will be followed or enforced. For instance, buried in the fine print of the new rules are provisions that permit members of Congress to accept reimbursement for travel from lobbyists if the travel is for “one-day trips,” so long as the lobbyists themselves do not initiate the trip, make the reservations, or pick up incidental expenses unrelated to the visit. Moreover, the Senate has not yet adopted these rules in precisely the same form; and neither chamber has yet clarified language or closed loopholes related to lobbying registration and reporting.

Do not suppose, however, that such remaining gaps in lobbying laws render the system wide open to abuses or evasions. For one thing, loopholes and all, the lobbying laws are now tighter than ever. For another, the most significant legal constraints on interest groups come not from the current federal lobbying law (though that may change), but from the tax code and the campaign finance laws. A nonprofit organization—which includes not only charitable groups but almost all voluntary associations that have an interest in politics—need not pay income taxes, and financial contributions to it can be deducted on the donor’s income tax return, provided that the organization does not devote a “substantial part” of its activities to “attempting to influence legislation.”<sup>61</sup> Many tax-exempt organizations do take public positions on political

questions and testify before congressional committees. If the organization does any serious lobbying, however, it will lose its tax-exempt status (and thus find it harder to solicit donations and more expensive to operate). Exactly this happened to the Sierra Club in 1968 when the Internal Revenue Service revoked its tax-exempt status because of its extensive lobbying activities. Some voluntary associations try to deal with this problem by setting up separate organizations to collect tax-exempt money—for example, the NAACP, which lobbies, must pay taxes, but the NAACP Legal Defense and Educational Fund, which does not lobby, is tax-exempt.

Finally, the campaign finance laws, described in detail in Chapter 8, limit to \$5,000 the amount any political action committee can spend on a given candidate in a given election. These laws have sharply curtailed the extent to which any *single* group can give money, though they have increased the *total* amount that different groups are providing.

Beyond outlawing bribery or other manifestly corrupt forms of behavior, and restricting the sums that campaign contributors can donate, there is probably no system for controlling interest groups that would both make a useful difference and leave important constitutional and political rights unimpaired. Ultimately, the only remedy for imbalances or inadequacies in interest-group representation is to devise and sustain a political system that gives all affected parties a reasonable chance to be heard on matters of public policy. That, of course, is exactly what the Founders thought they were doing. Whether they succeeded or not is a question to which we shall return at the end of this book.

## LEARNING OBJECTIVES

### 7-1 Describe the roles of American political parties and how they differ from parties in other democracies.

A political party is an organization that works to elect candidates to public office and identifies candidates by a clear name or label. American parties tend to be somewhat weaker than their counterparts elsewhere for several structural reasons: control of access to the ballot, divided legislative/executive power, and federalism.

### 7-2 Summarize the historical evolution of the party system in America.

Initially, there were no parties in America; George Washington called parties “factions.” But as soon as it was time to select his replacement, the republic’s first leaders realized they had to organize their followers to win the election, and parties were born. They strengthened gradually during the 19th century, before progressive reforms weakened their power in the early to mid 20th century. More recently, however, the parties have become both stronger and more polarized.

### 7-3 Explain the major functions of political parties, and how they are organized.

Parties help candidates win office, and then coordinate their behavior once in office. To win office, they recruit candidates, nominate them (either via primaries or conventions), and then help them win the general election. The parties have a federalized structure; there is a national party, and state and local parties organized beneath them. While the different levels operate independently of one another, there are important areas of collaboration between them.

### 7-4 Define partisan identification, and explain how it shapes the political behavior of ordinary Americans.

Partisan identification refers to Americans’ attachment to a political party. For most people, it is like belonging to a political team. Party identification shapes vote choice powerfully in elections: more than 90 percent of partisans supported their party’s candidate in recent elections.



**7-5 Summarize the arguments for why America has a two-party system.**

The United States has a two-party political system because of two structural features in American politics: single-member districts and winner-take-all elections. Both features encourage the existence of two major parties, as smaller parties face great difficulty in winning elective office.

**7-6 Explain what an interest group is, and identify the main factors that led to their rise in America.**

An interest group is an organization of people sharing a common interest or goal that seeks to influence public policy. Several factors help to explain the rise in groups, including the growth of the market economy in America, government policy itself (by creating constituencies that receive benefits from the government), political movements that create political entrepreneurs, and the growing scope of government policy.

**7-7 Summarize the ways interest groups relate to social movements.**

Social movements are mass movements that push for a particular type of policy change. Groups that employ purposive benefits are especially likely to be linked to broad social movements.

**7-8 Explain the various ways interest groups try to influence the policymaking process.**

Groups use a variety of strategies, including lobbying (and more generally providing information), donations to legislators, and civil disobedience. The most effective strategies in any given instance depend on the type of group and its goals. Whether a group is successful is determined at least in part by its organization and the political environment.

**7-9 Describe the ways in which interest groups' political activity is limited.**

Interest groups' activities are restricted by literally scores of laws. For example, Washington lobbyists must register with the House or Senate. All registered lobbyists must divulge their client list and expenditures publicly. There are legal limits on PAC contributions. Every new wave of campaign finance laws (see Chapter 8) has resulted in more rules regulating interest groups. The Internal Revenue Service (IRS) has tightly restricted political activity by religious groups, private schools, and other organizations as a condition for their exemption from federal income tax. Finally, states and cities have their own laws regulating interest groups, and some places are more restrictive than others.

**TO LEARN MORE**

Democratic National Committee: [www.democrats.org](http://www.democrats.org)

Republican National Committee: [www.rnc.org](http://www.rnc.org)

**Conservative Interest Groups:**

American Conservative Union: [www.conservative.org](http://www.conservative.org)

Christian Coalition: [www.cc.org](http://www.cc.org)

**Liberal Interest Groups:**

American Civil Liberties Union: [www.aclu.org](http://www.aclu.org)

Americans for Democratic Action: [www.adaction.org](http://www.adaction.org)

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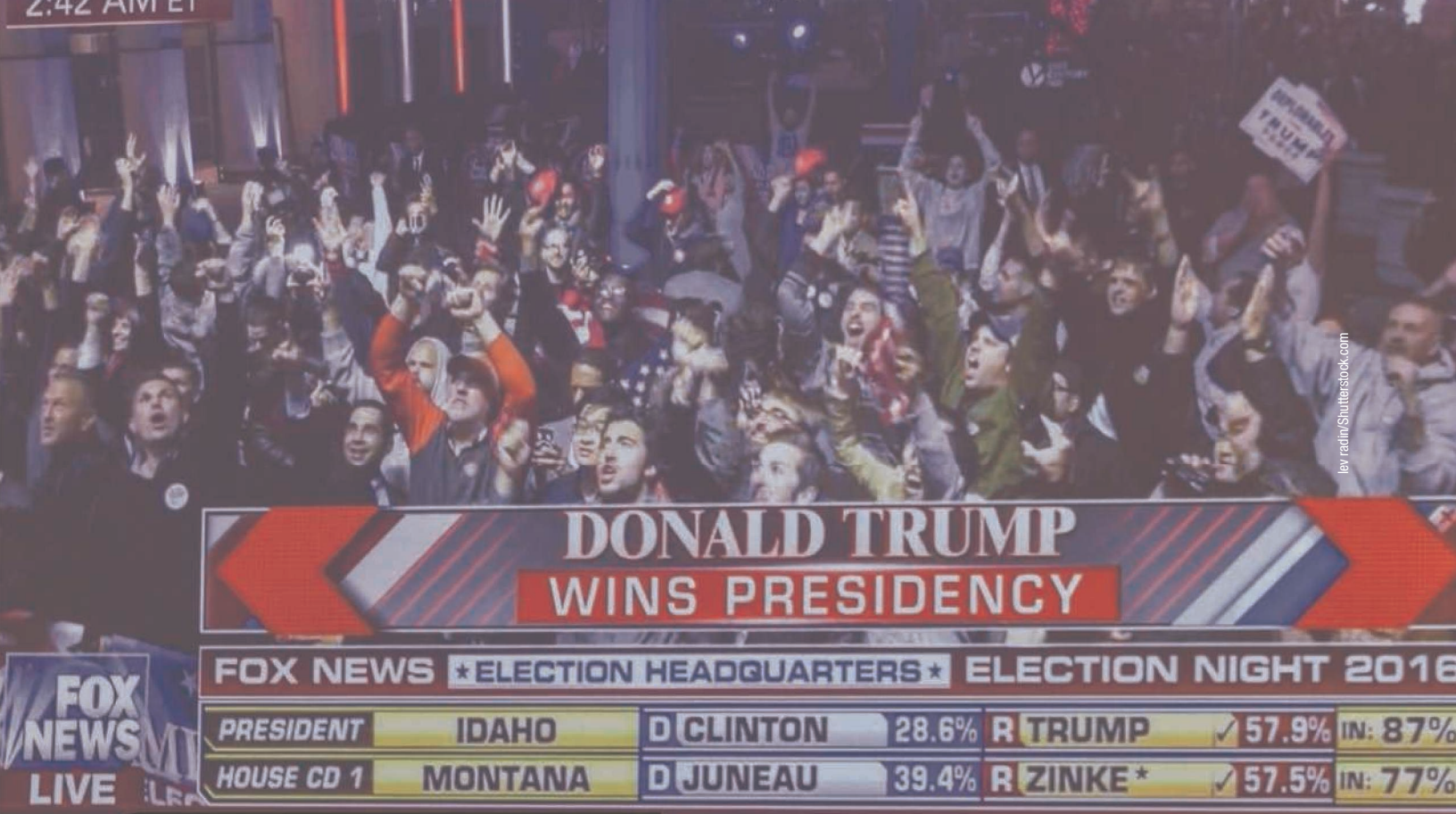
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## CHAPTER 8

# Elections and Campaigns

### LEARNING OBJECTIVES

- 8-1** Discuss how American voter turnout compares to other advanced industrialized democracies, and how it has changed over time.
- 8-2** Outline what factors explain who participates in politics.
- 8-3** Describe the factors that influence the presidential primaries.
- 8-4** Explain how campaigns shape the outcome of presidential elections.
- 8-5** Summarize how voters learn about the candidates in elections.
- 8-6** Describe the key differences between presidential and congressional elections.
- 8-7** Summarize the history of campaign finance reform efforts, and explain the current state of campaign finance regulation.
- 8-8** Describe how elections shape public policy.



**political**

**participation** The many different ways that people take part in politics and government.

**voting-age****population (VAP)**

Citizens who are eligible to vote after reaching the minimum age requirement.

**voting-eligible****population (VEP)**

Citizens who have reached the minimum age to be eligible to vote, excluding those who are not legally permitted to cast a ballot.

Defined simply, **political participation** refers to the many different ways that people take part in politics and government: voting or trying to influence others to vote; joining a political party or giving money to a candidate for office; keeping informed about government or debating political issues with others; signing a petition; protesting a policy; advocating for a new law; or just writing a letter to an elected leader.

But no matter how they define it, most academics who study political participation pay close attention to voting and begin with a puzzle: Despite successive legal and other changes that might be expected to increase electoral participation, voter turnout rates in America today are lower than they were for previous generations, and millions of Americans now sit out each presidential and midterm national election.

**THEN**

Well into the 19th century, in most states only property-owning white males could vote. After the Civil War and into the mid-20th century, many states used all manner of stratagems to keep blacks from voting. Women did not receive the right to vote until 1920, when the Nineteenth Amendment to the Constitution was ratified. Before 1961, residents of the District of Columbia could not vote in presidential elections; the Twenty-Third Amendment to the Constitution gave them the right. Into the 1960s, most whites had only limited formal education; women and many minority groups faced legal, social, and other barriers or disincentives to voting; and there was nothing resembling today's steady stream of political news via multiple media outlets.

**NOW**

National laws extend voter eligibility to all persons age 18 or older (courtesy of the Twenty-sixth Amendment to the Constitution, ratified in 1971). No state may restrict voting based on discriminatory tests, taxes, or residency requirements. In areas where many non-English speakers live, election authorities must supply ballots written in their own language. People in all 50 states can register to vote when applying for a driver's license, and most states now allow voting by absentee ballot prior to Election Day even if voters do not reside outside their home state. Some states even conduct their elections through the mail. Over the last half-century, formal education levels have risen among all groups; and news, information, and opinions about politics and government are just about everywhere one turns (or clicks).

And yet, between 1860 and 1900, the percentage of eligible voters participating in presidential elections ranged between 65 percent and 80 percent. By comparison, over the last several decades, the percentage of eligible voters participating in presidential elections has dipped as low as 50 percent; half of eligible voters do not vote. Over the same period, voter turnout in midterm national elections has averaged well below 50 percent. In 2006, the Democrats took majority control of the U.S. House of Representatives, and then in 2010, the Republicans won the House majority back from the Democrats. But in each of these two recent, power-shifting midterm national elections, about 80 million U.S. residents age 18 or older did not vote. In the 2014 midterm elections, participation was at its lowest level in 70 years.<sup>1</sup> Young voters—despite averaging more years of formal education, facing fewer legal barriers, and enjoying more access to information than any previous generation—are nonetheless mostly nonvoters. For example, in the five midterm national elections since 1998, barely one in five 18- to 24-year-olds cast a ballot.

What explains nonvoting? In historical terms, or relative to rates in other modern democracies, are voter turnout rates in America today really as bad as they seem? And what about other forms of political participation in America today?

**8-1 A Close Look at Nonvoting**

Start with the fact that there are at least two different ways to measure voter turnout, and they give different answers about the prevalence of nonvoting.<sup>2</sup> All U.S. residents age 18 or older constitute the **voting-age population (VAP)**. But many residents of the United States who are of voting age (18 or older) are not, in fact, eligible to vote. Two such groups are noncitizens who reside in America and convicted felons who in most states are disenfranchised by state laws. Unlike the VAP, the **voting-eligible population (VEP)** measure excludes from the calculation U.S. residents age 18 or older who are not permitted legally to cast a ballot.

For example, in 2008 the VAP numbered nearly 231 million, but that included about 18 million noncitizens and disenfranchised convicted felons. Measured by the VAP, the national voter turnout rate was 53.6 percent in 2012, but measured by the VEP it was 58.2 percent. Since 1948, the gap between the VAP and the VEP measures of voter turnout has grown as the percentage of the population age 18 and older that consists of noncitizens and disenfranchised convicted felons has increased (see Table 8-1).

Another important nuance about nonvoting concerns registered versus unregistered voters. Take a look at Table 8-2. Column A compares democratic nations in terms of the average percentage of their VAP that went to the polls in dozens of post-1945 national legislative (congressional or parliamentary) elections. The United States ranks dead last with 47.7 percent voter turnout.

Now, however, look at Column B. It compares the same nations in terms of percentage of registered voters (those eligible voters who have completed a registration form by a set date) who went to the polls in the same legislative elections. The United States still ranks low but looks some what

**TABLE 8-1** Two Methods of Calculating Turnout in Presidential Elections, 1948–2016

Year	Voting-Age Population (VAP)	Voting-Eligible Population (VEP)
1948	51.1%	52.2%
1952	61.6	62.3
1956	59.3	60.2
1960	62.8	63.8
1964	61.9	62.8
1968	60.9	61.5
1972	55.2	56.2
1976	53.5	54.8
1980	52.8	54.7
1984	53.3	57.2
1988	50.3	54.2
1992	55.0	60.6
1996	48.9	52.6
2000	51.2	55.6
2004	55.0	60.0
2008	56.8	61.7
2012	53.6	58.2
2016	52.5%	56.9%

**Note:** The figures for 2016 are preliminary, and will change once all ballots are counted.

**Source:** Data until 2000 from Michael P. McDonald and Samuel L. Popkin, “The Myth of the Vanishing Voter,” *American Political Science Review* 95 (December 2001): table 1, 966. Data from 2004 forward are from Michael McDonald, United States Election Project, Voter Turnout Data, <http://www.electproject.org>.

better, with 66.5 percent registered voter turnout; and the registered voter turnout in post-1968 U.S. presidential elections is about 70 percent.

Although we vote at lower rates in the United States than people do abroad, the meaning of our voting is different. For one thing, we elect far more public officials than the citizens of any other nation do. There are more than a half million elective offices in the United States, and just about every other week of the year there is an election going on somewhere in this country. By contrast, in many European nations there is just one vote for a Member of Parliament every few years. That one vote naturally will take on more importance than the dozens of votes in the U.S. That said, because Americans vote for so many different offices, they do affect more of what government does by voting.

But the number of elections is not the only reason fewer Americans turn out to vote—there are structural reasons as well. Many Americans cannot vote because they have not registered; according to the U.S. Census Bureau, only 71 percent of eligible citizens actually are registered to vote.<sup>3</sup> Registration is the simplest barrier to voting, but also the most profound. No matter one's interest in politics, if you are not registered, you cannot vote.

Still, simply getting more people registered to vote is not a cure-all for nonvoting; in each national election since 2006,

**TABLE 8-2** Two Ways of Calculating Voting Turnout, Here and Abroad

A		B	
	Turnout as Percentage of Voting-Age Population		Turnout as Percentage of Registered Voters
Italy	92.0%	Australia	94.5%
New Zealand	86.0	Belgium	92.5
Belgium	84.8	Austria	83.1
Austria	84.4	New Zealand	90.8
Australia	84.2	Italy	89.8
Sweden	84.1	Netherlands	87.5
Netherlands	83.8	Sweden	87.1
Denmark	83.6	Denmark	85.9
Canada	82.6	Germany	85.4
Germany	80.2	Norway	80.4
Norway	79.2	United Kingdom	75.2
United Kingdom	73.8	Canada	73.9
France	67.3	France	73.8
Switzerland	51.9	<b>United states</b>	<b>66.5</b>
<b>United States</b>	<b>47.7</b>	Switzerland	56.5

**Source:** Rafael Lopez Pintor, Maria Gratschew, and Kate Sullivan, “Voter Turnout Rates from a Comparative Perspective,” in *Voter Turnout Since 1945: A Global Report* (Stockholm: International Institute for Democracy and Electoral Assistance, 2002).

about half of all nonvoters were registered. When registered nonvoters were asked why they did not vote, several of the most common answers were that they had scheduling conflicts (such as work or school), were uninterested in voting, had an illness or disability that prevented them from voting, or did not like the candidates who were running.<sup>4</sup>

In response to the most common reason why registered voters fail to vote—school, work, or other scheduling conflicts—some have proposed making Election Day a national holiday or holding national elections on weekends. Such proposals, though popular, remain only proposals. However, states have taken steps to make voting easier for citizens, as we discuss in the Constitutional Connections box on p. 149. While proponents had hoped that such reforms would increase voter turnout dramatically, the evidence suggests that their effect is very modest, on the order of a few percentage points at most.<sup>5</sup>

If voter turnout rates are to rise substantially in the United States, then nonregistered voters must become registered to vote in ever greater numbers. In each of several recent national elections, along with the roughly 40 million registered

nonvoters, another 40 million or so voting-age citizens were not registered to vote.

In most European nations, the government registers citizens automatically. By contrast, in America, the entire burden of registering to vote falls on the individual voters: they must learn how and when and where to register; they must take the time and trouble to go somewhere and fill out a registration form; and they must register if they happen to move. It takes more effort to register to vote in this country than it does to register in other democracies; it should not be surprising that fewer people are registered here than abroad.

But would simplifying registration necessarily result in higher percentages of Americans becoming registered voters and voting? In 1993, Congress passed a law designed to make it easier to register to vote. Known as the motor-voter law, it allows people in all 50 states to register to vote when applying for driver's licenses, and to provide registration through the mail and at some state offices that serve the disabled or provide public assistance (such as checks for eligible low-income families).

The evidence regarding the motor-voter law's impact on voter participation remains hard to interpret definitively. In 2001, eight years after the law was enacted, millions of citizens had registered to vote via state motor vehicles bureaus or other state offices. However, a study found "that those who register when the process is costless are less likely to vote."<sup>6</sup> By 2012, motor-voter law-related means of registration were the single most widely used (see Figure 8-1). But between 1993 and 2012, while voter registration rates had increased somewhat, there still was no solid evidence that the law had increased voter turnout substantially. Other studies of efforts to facilitate registration have come to similar conclusions: increasing registration only very modestly increases turnout.<sup>7</sup> Whether current

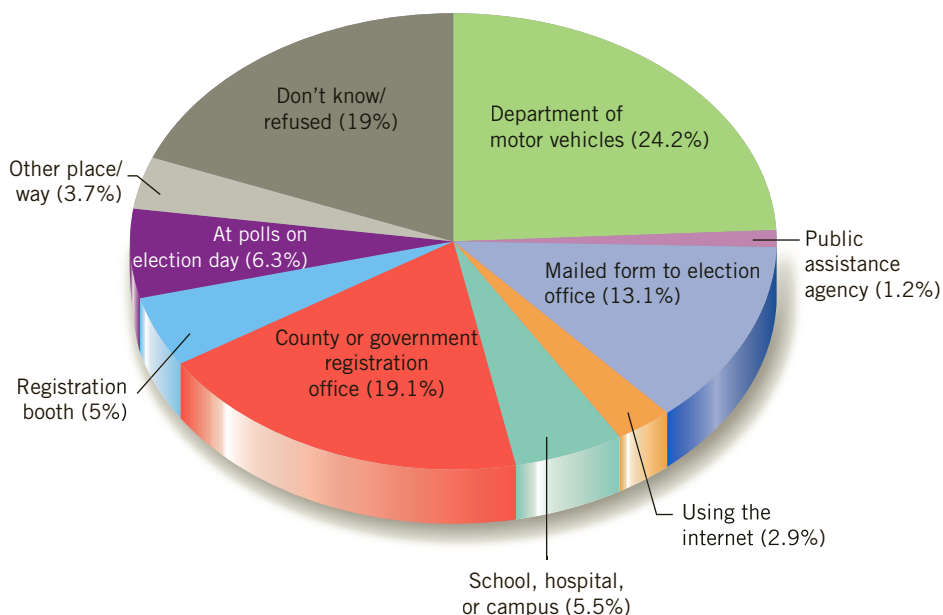
efforts to decrease the cost of registration—such as laws in Oregon, California, Vermont, West Virginia and Illinois that automatically register all citizens who have a driver's license or state ID, unless they opt out—will increase turnout remain to be seen.<sup>8</sup>

In recent years, campaigns have begun to invest more heavily in old-fashioned get-out-the-vote (GOTV) drives to boost voter turnout. Many careful studies have found that such efforts do increase participation, though the exact amount depends on many different factors—including the type of message used, how the campaign makes contact with the voter (i.e., through a mailer, a phone call, or an in-person visit from the canvasser), the salience of the election, and so forth.<sup>9</sup>

One of the most effective get-out-the-vote messages is the "social pressure" message. In this message, subjects are told before the election that whether they vote in the election is a matter of public record (as it is in nearly all states), and after the election, the campaign will inform their neighbors whether or not they voted (they send a mailer indicating who voted on the block, and who did not). This message is powerful: People do not want their nonvoting revealed to their neighbors!

Such efforts, replicated on a large scale, can help to shape who wins and the composition of the electorate. For example, in 2008 and 2012, the Obama campaign conducted a massive get-out-the-vote effort. The campaign organized 2.2 million volunteers to have 24 million conversations with Americans and register 1.8 million additional voters.<sup>10</sup> While Republican operations were not quite as large, they too were impressive. One estimate suggests that the 2012 Romney and Obama campaigns together generated over 400 million voter contacts (obviously contacting many voters multiple times), with a net increase of almost 2.6

**FIGURE 8-1** Method of Voter Registration, 2012



**Source:** U.S. Bureau of the Census, "Voting and Registration in the Election of 2012," May 2013.



million voters as a result.<sup>11</sup> Perhaps even more importantly, these studies find that being involved in such activities helps to bring many new people into the political process, integrating them into their communities more fully—illustrating that the effects of get-out-the-vote efforts extend beyond the ballot box.<sup>12</sup>

But such efforts are not a panacea. While Obama's effort was especially successful, it is unclear whether future efforts will achieve such considerable success. Furthermore, more generally, political scientists have shown that get-out-the-vote efforts often heighten participatory inequalities by targeting those who are already most likely to vote, rather than those who are more marginal.<sup>13</sup> While there have been particular efforts targeted at more marginal voters to increase their participation,<sup>14</sup> such efforts are relatively rare. This suggests that while get-out-the-vote drives can help to reshape the electorate, they are not a full solution to the lack of voter participation in America.

Of course, voting is only one way of participating in politics. It is important—we could hardly be considered a democracy if nobody voted—but it is not all-important. Joining civic associations, supporting social movements, writing to legislators, fighting city hall—all these and other activities are ways of participating in politics. It is possible that, by these measures, Americans participate in politics more than most Europeans, or anybody else for that matter. Moreover, it is possible that low rates of registration indicate that people are reasonably well satisfied with how the country is governed. If 100 percent of all adult

Americans registered and voted (especially under a system that makes registering relatively difficult), it could mean that people were deeply upset about how things were run. In short, it is not at all clear whether low voter turnout is a symptom of political disease or a sign of political good health.

The important question about participation is not how much participation there is, but how different kinds of participation affect the kind of government we get. This question cannot be answered just by looking at voter turnout, the subject of this chapter; it also requires us to look at the composition and activities of political parties, interest groups, and the media (the subjects of other chapters in this book).

Nonetheless, voting is important. To understand why participation in American elections takes the form that it does, we must first understand how laws have determined who shall vote and under what circumstances.

## The Rise of the American Electorate

It is ironic that relatively few citizens vote in American elections, since it was in this country that the mass of people first became eligible to vote. At the time the Constitution was ratified, the vote was limited to property owners or taxpayers, but by the administration of Andrew Jackson (1829–1837) it had been broadened to include virtually all white male adults. Only in a few states did property restrictions persist; they were not abolished in New Jersey until



## CONSTITUTIONAL CONNECTIONS

### State Voting Laws and Procedures

“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .

Thus begins Article I, Section 4, of the Constitution. While Congress has put in place more rules to regulate elections over time, states still differ a great deal in how they conduct their elections. With few exceptions, the federal courts, including the U.S. Supreme Court, have let stand present-day differences in states' voting laws and procedures.

Currently, in addition to the traditional Election Day trek to a polling place or “voting booth” in one's home voting district, there are three other ways for voting-age Americans to cast ballots.

- **Early Voting:** Thirty-three states and the District of Columbia permit people to cast in-person ballots prior to Election Day, and without requiring that they furnish any excuse for doing so. The early voting periods ranged from the Friday before Election Day to 45 days before Election Day. The average early voting period was about 20 days.
- **Absentee Voting:** All states permit absentee voting by mail for military personnel, their voting-age dependents,

and U.S. citizens living overseas. All states also mail absentee ballots to certain other voters; but in 27 states and the District of Columbia, no excuse for absentee voting is required, while in 21 other states, an excuse is required. In seven states, certain citizens receive “permanent absentee ballot” privileges.

- **Mail Voting:** A ballot is mailed automatically to every eligible citizen, no request required. There are no traditional Election Day voting sites. Two states, Washington and Oregon, used this system. Colorado mails a ballot to all eligible citizens, but citizens may also vote in person at the Voter Service and Polling Center on Election Day.

Constitutionally, states have also been permitted to decide whether to deny voting rights to voting-age citizens who have been convicted of felony crimes. There continue to be wide state-by-state disparities in felon disenfranchisement laws and procedures.

**Source:** National Conference of State Legislatures, “Absentee and Early Voting,” October 2014.

**literacy test** A requirement that citizens show that they can read before registering to vote.

**poll tax** A requirement that citizens pay a tax in order to register to vote.

**grandfather clause** A clause in registration laws allowing people who do not meet registration requirements to vote if they or their ancestors had voted before 1867.

**white primary** The practice of keeping blacks from voting in the southern states' primaries through arbitrary use of registration requirements and intimidation.

1844 or in North Carolina until 1856. And, of course, African American males could not vote in many states, in the North as well as in the South, even if they were not slaves. Women could not vote in most states until the 20th century; Chinese Americans were widely denied the vote; and being incarcerated is grounds for losing the franchise in many states even today. Aliens, on the other hand, often were allowed to vote if they had at least begun the process of becoming citizens. By 1880, only an estimated 14 percent of all adult males in the United States could not vote; in England in the same period, about 40 percent of adult males were disfranchised.<sup>15</sup>

## From State to Federal Control

Initially, it was left entirely to the states to decide who could vote and for what offices. The Constitution gave Congress the

right to pick the day on which presidential electors would gather and to alter state regulations regarding congressional elections. The only provision of the Constitution requiring a popular election was the clause in Article I stating that members of the House of Representatives be chosen by the “people of the several states.”

Because of this permissiveness, early federal elections varied greatly—with some states having at-large (statewide) districts, and others electing more than one legislator from a given district. Congress, by law and constitutional amendment, has steadily reduced state prerogatives in these matters. In 1842, a federal law required that all members of the House be elected by districts; other laws over the years required that all federal elections be held in even-numbered years on the Tuesday following the first Monday in November.

The most important changes in elections have been those that extended the suffrage to women, African Americans, and 18-year-olds, and made mandatory the direct popular election of U.S. senators. The Fifteenth Amendment, adopted in 1870, said that the “right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.” Reading those words today, one would assume they gave African Americans the right to vote. That is not what the Supreme Court of the 1870s thought they meant. By a series of decisions, it held that the Fifteenth Amendment did not necessarily confer the right to vote on anybody; it merely asserted that if someone was denied that

right, the denial could not be explicitly on the grounds of race. And the burden of proving that it was race that led to the denial fell on the black citizen who was turned away at the polls.<sup>16</sup>

This interpretation opened the door to three especially notorious but then-legal devices to keep blacks from voting. One was a **literacy test** (a large proportion of former slaves were illiterate); another was a requirement that a **poll tax** be paid (most former slaves were poor); and the third was the practice of keeping blacks from voting in primary elections (in the one-party South, the only meaningful election was the Democratic primary). To allow whites who were illiterate or poor to vote, a **grandfather clause** was added to the law, saying that a person could vote, even if he did not meet the legal requirements, if he or his ancestors voted before 1867 (blacks, of course, could not vote before 1867). When all else failed, blacks were intimidated, threatened, or harassed if they showed up at the polls.

There began a long, slow legal process of challenging in court each of these restrictions in turn. One by one, the Supreme Court set most of them aside. The grandfather clause was declared unconstitutional in 1915,<sup>17</sup> and the **white primary** finally fell in 1944.<sup>18</sup> Some of the more blatantly discriminatory literacy tests also were overturned.<sup>19</sup> The practical result of these rulings was slight; only a small proportion of voting-age blacks were able to register and vote in the South, and they were found mostly in the larger cities. A dramatic change did not begin until 1965, with the passage of the Voting Rights Act. This act suspended the use of literacy tests and authorized the appointment of federal examiners who could order the registration of blacks in states and counties (mostly in the South) where fewer than 50 percent of the voting-age population were registered or had voted in the last presidential election. It also provided criminal penalties for interfering with the right to vote.

Though implementation in some places was slow, the number of African Americans voting rose sharply throughout the South. For example, in Mississippi the proportion of voting-age blacks who registered rose from 5 percent to over 70 percent from 1960 to 1970. These changes had a profound effect on the behavior of many white southern politicians; Governor George Wallace stopped making pro-segregation speeches and began courting the black vote.

Women were kept from the polls by law more than by intimidation, and when the laws changed, women almost immediately began to vote in large numbers. By 1915, several states, mostly in the West, had begun to permit women to vote. But it was not until the Nineteenth Amendment to



## LANDMARK CASES

### Right to Vote

- **Smith v. Allwright (1944):** Because political parties select candidates for public office, they may not exclude blacks from voting in their primary elections.

the Constitution was ratified in 1920, after a struggle lasting many decades, that women generally were allowed to vote. At one stroke, the size of the eligible voting population almost doubled. Contrary to the hopes of some and the fears of others, no dramatic changes occurred in the conduct of elections, the identity of the winners, or the substance of public policy. Initially, at least, women voted more or less in the same manner as men, though not quite as frequently.

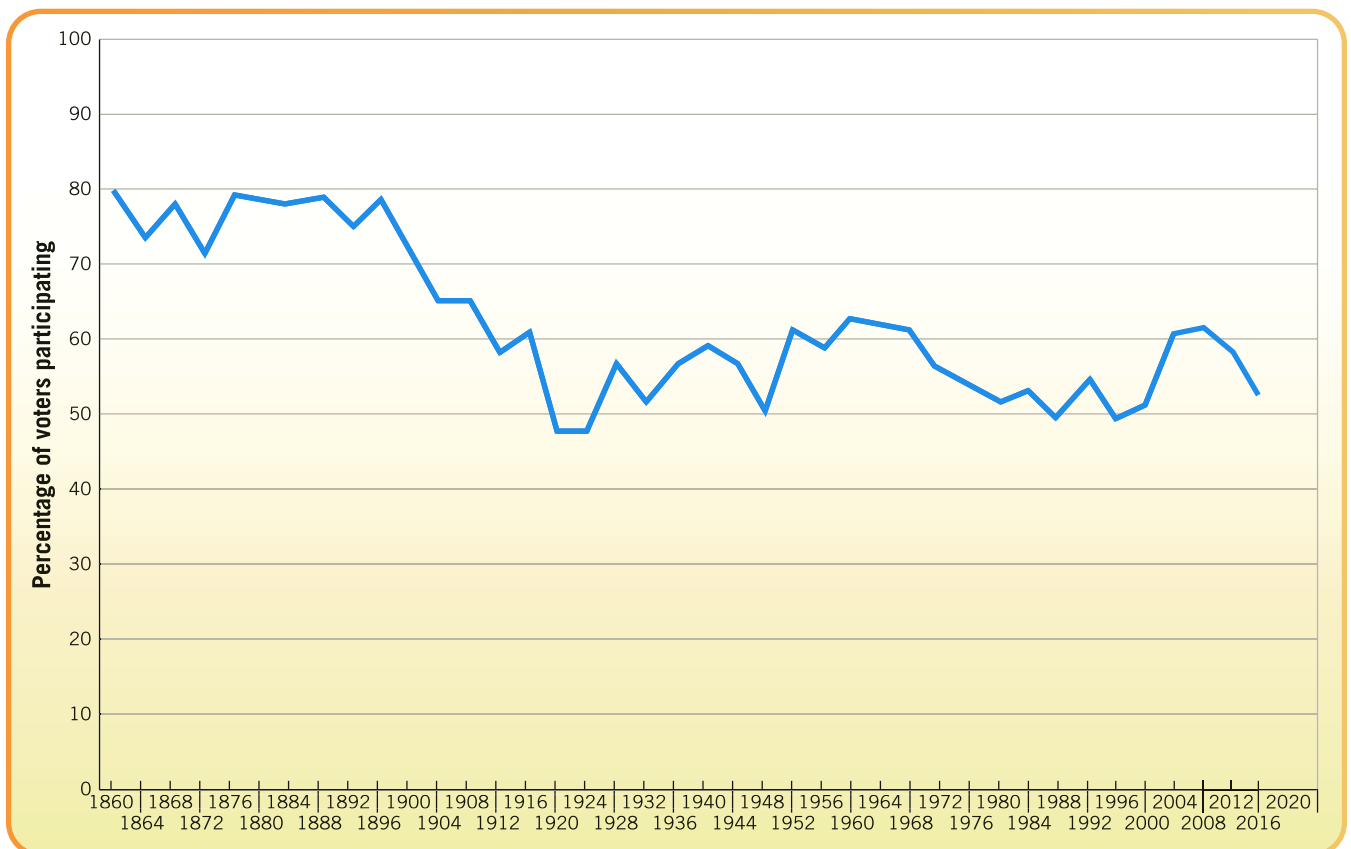
The political impact of the youth vote was also less than expected. The Voting Rights Act of 1970 gave 18-year-olds the right to vote in federal elections beginning January 1, 1971. It also contained a provision lowering the voting age to 18 in state elections, but the Supreme Court declared this unconstitutional. As a result, a constitutional amendment, the Twenty-sixth, was proposed by Congress and ratified by the states in 1971. The 1972 elections became the first in which all people between the ages of 18 and 21 could cast ballots (before then, only four states had allowed those under 21 to vote). About 25 million people suddenly became eligible to participate in elections, but their turnout (42 percent) was lower than for the population as a whole, and they did not flock to any particular party or candidate.

Every presidential election year since 1972 has been accompanied by predictions that the “youth vote” is likely to surge. Such predictions were especially prevalent in 2008, when 23 million citizens under age 30—representing 52 percent of the 18-to 29-year-old voting population—voted. That was a higher fraction than in 1996 (37 percent), 2000 (41 percent), and 2004 (48 percent), but lower than 1972 (55 percent) and the same as 1992 (52 percent). In 2012, that figure dropped back to 45 percent. Moreover, in every presidential election from 1996 through 2004, the under-30 youth vote accounted for 17 percent of the total election-day electorate; in 2008 the fraction rose, but only to 18 percent, and dropped back to below 17 percent in 2012.

## Voter Turnout

The proportion of the voting-age population that has gone to the polls in presidential elections has remained about the same—between 50 and 63 percent of those eligible—at least since 1928, and appears today to be much smaller than in the latter part of the 19th century (see Figure 8-2). In every presidential election between 1860 and 1900, at

**FIGURE 8-2** Voter Participation in Presidential Elections, 1860–2012



**Note:** Several southern states did not participate in the 1864 and 1868 elections. The figures for 2016 are preliminary, and will change once all ballots are counted.

**Sources:** For 1860–1928: Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, part 2*, 1071; 1932–1944: *Statistical Abstract of the United States*, 1992, 517; 1948–2000: Michael P. McDonald and Samuel L. Popkin, “The Myth of the Vanishing Voter,” *American Political Science Review* 95 (December 2001): table 1, 966; 2004–2012 elections, American National Election Studies (ANES).



**Australian ballot** A government-printed ballot of uniform dimensions to be cast in secret that many states adopted around 1890 to reduce voting fraud associated with party-printed ballots cast in public.

**voter identification laws** Laws requiring citizens to show a government-issued photo ID in order to vote.

least 70 percent of the eligible population apparently went to the polls, and in some years (1860 and 1876) almost 80 percent seem to have voted. Since 1900, turnout has not reached 70 percent in a single presidential election, and on two occasions (1920 and 1924), it did not even reach 50 percent.<sup>20</sup> Even outside the South, where efforts to disenfranchise African Americans made data on voter turnout especially hard to interpret, turnout seems to have declined; over 85 percent of the voting-age population participated in presidential elections in non-Southern states

between 1884 and 1900, but only 68 percent participated between 1936 and 1960, and even fewer have done so since then.<sup>21</sup>

Scholars have debated the meaning of these figures. One view is that even allowing for the shaky data on which the estimates are based, this decline in turnout has been real—and is the result of waning popular interest in elections and weakened competitiveness of the two major parties. Nineteenth-century parties fought hard, worked to get voters to the polls, kept formal barriers to participation low, and had close, exciting elections. But by 1896, when the South had become a one-party Democratic region and the North heavily Republican, elections became less competitive, parties invested less in turning out voters, citizens became less interested, and participation fell.<sup>22</sup>

There is another view, however, arguing that the decline in turnout is largely illusory. Until around the beginning of the 20th century, voting fraud was commonplace because it was easy to pull off. The political parties, not the government, printed the ballots; they often were cast in public, not private, voting booths; there were few serious efforts to decide who was eligible to vote, and the rules that did operate were easily evaded. The parties often controlled the counting of votes, padding the totals whenever they feared losing. As a result of these machinations, often the number of votes counted was larger than the number cast, and often the number cast was in turn larger than the number of individuals eligible to vote.

Around 1890, the states began adopting the **Australian ballot**. This was a government-printed ballot of uniform size and shape that was cast in secret, created to replace the old party-printed ballots cast in public. By 1910, only three states were without the Australian ballot. Its use cut back on (but certainly did not eliminate) vote buying and fraudulent vote counts.

In short, if votes had been cast legally and counted honestly in the 19th century, the statistics on election turnout might well be much lower than the inflated figures we now have.<sup>23</sup> To the extent that this is true, the decline in voter participation may not have been as great as some have suggested. Nevertheless, most scholars believe that turnout

probably did actually decline somewhat after the 1890s. One reason was that voter registration regulations became more burdensome: there were longer residency requirements; aliens who had begun but not completed the process of becoming citizens could no longer vote in most states; it became harder for African Americans to vote; educational qualifications for voting were adopted by several states; and voters had to register long in advance of the elections. These changes, designed to purify the electoral process, were aspects of the progressive reform impulse (described in Chapter 7) and served to cut back on the number of people who could participate in elections.

Strict voter registration procedures tended, like most reforms in American politics, to have unintended consequences. These changes not only reduced fraudulent voting but also reduced voting generally, because they made it more difficult for certain groups of perfectly honest voters—those with little education, for example, or those who had moved recently—to register and vote. This was not the first time, and it will not be the last, that a reform designed to cure one problem created another.

In the past decade, the major legal debate over the vote has been the rise of **voter identification laws**. Thirty-six states have passed laws that would require voters to show a government-issued photo identification to vote.<sup>24</sup> Proponents claim such laws are needed to prevent voter fraud (by having someone pretend to be someone else at the polling place). However, numerous careful studies and government reports have found that such in-person voter fraud is extremely rare.<sup>25</sup>

Critics of such laws argue that many citizens lack photo identification and hence cannot vote; several studies suggest that approximately 10 percent of the population does not have valid photo identification. While nearly all laws provide a provision for voters to obtain such identification, many of those without identification also lack the paperwork needed to get them. Furthermore, those without proper identification are overwhelmingly poor and/or racial minorities.<sup>26</sup> Several studies also suggest that these voter ID laws may not be enforced uniformly; minority voters are more likely to be asked to show an ID, even after relevant demographic factors are taken into account.<sup>27</sup>

Given this, many such laws have been challenged in court. While the Supreme Court ruled in 2008 that such laws are not necessarily unconstitutional,<sup>28</sup> subsequent court challenges have struck down some laws while leaving others intact, depending on the specifics of the law. Undoubtedly there will continue to be legal challenges to these laws into the future. Regardless of their legal status, however, such laws do not seem to have much impact on turnout. The best evidence is that if these laws affect aggregate turnout at all, they reduce it by at most a few percentage points.<sup>29</sup>

Even after all the legal changes are taken into account, there seems to have been a decline in citizen participation in elections. Between 1960 and 1980, the proportion of voting-age people casting a ballot in presidential elections fell by about 10 percentage points—a drop that cannot be explained by how ballots were printed, how registration rules



**IMAGE 8-1** Supporters of both major nominees gather outside the second 2016 presidential debate in St. Louis, MO.

were rewritten, nor the other changes reviewed above. Nor can these factors explain why 1996 witnessed not only the lowest level of turnout (49 percent) in a presidential election since 1924 but also the single steepest four-year decline (from 55 percent in 1992) since 1920. While turnout increased somewhat in 2008 and 2012, it still is much lower than the levels seen earlier in the 20th century.

Actual trends in turnout aside, what if they gave an election and everyone came? Would universal turnout change national election outcomes and the content of public policy? It has long been argued that because the poor, less educated, and minorities are overrepresented among nonvoters, universal turnout would strongly benefit Democratic candidates and liberal causes. But careful studies of this question have found that the “party of nonvoters” largely mirrors the demographically diverse and ideologically divided population that goes to the polls, and that even if everyone voted, the outcome would only change by a small amount, not enough to actually change the balance of an election or many policies.<sup>30</sup>

## 8-2 Who Participates in Politics?

To understand better why voter turnout declined and what, if anything, that decline may mean, we must examine who participates in politics.

### Forms of Participation

While voting is perhaps the quintessential form of political participation, there are many other ways of being involved in the political process. For example, people can be involved in a campaign: they can volunteer to staff a phone bank or participate in a get-out-the-vote drive, or they can write a check to a candidate or a party. They can also participate in many other ways: they can attend community meetings; contact public officials to direct their attention to a particular problem; work through an interest group; participate in a protest, demonstration, or social movement; and so forth. When political scientists think of participation, we think of any method that citizens engage in to try and influence politics.

As we saw above, in recent years, approximately 50–60 percent of the public has voted in presidential elections. Other types of political participation are less common. For example, in most election years, approximately 20 percent display a yard sign, bumper sticker, or button; 15 percent give money to a candidate or party; 10 percent attend a political meeting or rally; and only 5–6 percent volunteer for a campaign or party. Such patterns have been quite consistent for more than 50 years, suggesting that it is not simply that today’s citizens participate less than those of yesteryear.<sup>31</sup>

Such numbers perhaps should not surprise us. After all, political participation is a costly activity, requiring resources (time, money, and so forth) as well as interest in politics. That said, however, we should not conclude that Americans are disinterested in their communities; studies have found that Americans frequently participate in apolitical ways, such as volunteering with a religious or charitable organization. Furthermore, relative to citizens from other nations, Americans are more involved in politics and community affairs (even though we turn out to vote at lower levels, as we saw in Table 8-2).<sup>32</sup>

## 8-3 What Drives Participation?

But who participates in politics? The characterization above suggests that some people are deeply involved, while others are content to sit on the political sidelines. What explains these differences? Political scientists focus on five main sets of factors.

First, and perhaps most importantly, citizens need the resources essential to participate in politics. Resources to participate in politics include factors such as time, money, and civic skills. Time is an obvious prerequisite to participating in politics; if you do not have the free time to be politically active, you cannot participate. Likewise, if you are going to donate to a campaign, you need the financial resources to make the contribution.<sup>33</sup> Resources are, in effect, the “raw ingredients” of political participation; without these background characteristics, it is difficult to participate.

But resources alone do not explain who participates in politics. After all, some people with advanced degrees always vote, while others never come to the polls. To understand participation fully, resources are only a start. Engagement with politics also matters. To participate, you must believe your voice matters in the political process, and you have to be interested in politics. Absent this, you are unlikely to participate, no matter what your level of resources.<sup>34</sup>

This interest in politics can come from many places, but schools are a particularly important source. Education helps to foster civic norms in students, and helps them to realize that their participation in government matters. Such effects are especially strong among those who take government and/or civics classes, which instill in students the importance of political participation. As a result, these individuals participate more later in life.<sup>35</sup> So education increases participation in two ways: by providing civic skills and by increasing political interest. Given this, education is one of the most important pathways to participation in America.



**IMAGE 8-2** Young people attend a rally in support of Senator Bernie Sanders during the 2016 Democratic Primary.

Third, for many people, being mobilized is a key step to participation. When asked why they participated, they said they did so because they were asked.<sup>36</sup> We saw above that political parties and campaigns (via get-out-the-vote efforts) are key mobilizing factors in contemporary elections. But so too are other organizations. For example, it has long been noted that more religious citizens are more likely to participate in politics. Scholars have found that the reason is that churches foster social networks that encourage participation. Many people at a place of worship are involved in their community more broadly, and they encourage their friends there to participate politically as well. As a result, more religious people participate more—not because of resources, but because of mobilization.<sup>37</sup> Likewise, churches have provided a valuable mechanism for bringing Latino voters into the political system.<sup>38</sup> Such mobilization also takes place through the Kiwanis Club, a bowling league, or even just among friends.

Such mobilization becomes even more important when we realize that participation is habit-forming. Those who are mobilized by a get-out-the-vote message in one election are more likely to vote in future elections, even without receiving another get-out-the-vote message.<sup>39</sup> Likewise, young voters who participate in one election are more likely to participate in future elections,<sup>40</sup> and, more generally, for most citizens, voting is a habit: Once they begin to vote, they are likely to continue, as with any habit.<sup>41</sup> Being mobilized in one election can have important spillover consequences for future elections as well.

Fourth, some people become politically active because they care deeply about a particular issue. For example, they may be upset at drug dealers using a corner park in their neighborhood and organize a local neighborhood watch, partnering with the police to drive the drug dealers out. In so doing, they learn valuable skills about how to organize their neighbors, how to work with local officials, and so forth. These skills are directly transferable to other types of political participation. Indeed, many of those who first become involved with politics or community life because of a particular issue often then become more broadly politically involved.<sup>42</sup> Such

pathways to participation are especially important for those who lack the types of political resources discussed above. Lacking resources, passion and motivation can inspire some voters to participate.

Finally, experiences with government programs can also shape political participation. For example, prior to the creation of the Social Security program, senior citizens participated far less than other Americans; but today, seniors are among the most politically involved Americans. Why did Social Security increase participation among the aged? Social Security gave seniors income security, and meant that many of them no longer had to work. This gave them free time to become politically engaged, and they focused much of their attention on the program most directly relevant to their lives: Social Security. Seniors, in the wake of the program's passage, became more involved in politics, and argued on behalf of the program, thereby strengthening it further. So citizens create programs (by participating in government), but programs also create citizens by giving them valuable political skills.<sup>43</sup>

## 8-4 Political Campaigns Today

So far in this chapter, we have considered why people vote and participate in politics more broadly. But given that they will turnout and vote, how do individuals decide for whom they will vote? They do so by following political campaigns.

Perhaps the most striking finding about contemporary campaigns is the amount of money that candidates raise and spend during the election. In the 2014 midterm elections, all candidates for national office raised and spent more than \$1.7 billion—more than \$1 billion in House races, and about \$637 million in Senate races. According to an April 2013 report by the Federal Election Commission, during the national election cycle that ended in 2012, presidential and congressional candidates combined total receipts (about \$3.2 billion), plus those of party committees (about \$1.6 billion) and PACs (about \$2.2 billion), totaled about \$7.1 billion.

Thus, we have entered the era of the \$7 billion presidential election cycle. The climb there has been steep but steady. For instance, in 1980, all presidential candidates raised about \$162 million. In 2012, all presidential candidates raised about \$1.3 billion. Adjusted for inflation, the 2012 total is about five times the 1980 total.

Between 2000 and 2012, the amount of money received by all presidential candidates (including the two party nominees and all their respective primary challengers) more than doubled: In 2000, 17 presidential candidates had total receipts of about \$578 million, while in 2012, 14 presidential candidates had receipts of roughly \$1.3 billion. Adjusted for inflation, the 2012 total is about 1.7 times the 2000 total. Congressional fundraising tells much the same tale. Between 2002 and 2012, the total receipts of congressional candidates about doubled; adjusted for inflation, the 2012 total is about 1.5 times the 2002 total. Whether we will witness \$8 billion (or \$9 billion, or more) national election cycles before the decade is out remains to be seen, but there would appear to be no end in sight to increases in the amount of money that candidates, parties, PACs, Super PACs and other political groups can collect.



Many people lament that so much money is spent on elections, and argue that the consultants, media ads, and modern campaign techniques end up emphasizing the ephemeral and avoiding the real issues. While it is true that media reports of elections leave much to be desired (as we discussed in Chapter 6), campaigns do stress the issues, and voters respond to their messages in reasonable ways. While they are far from perfect, campaigns are ultimately the most important pathway linking voters' preferences to government policy. We show what campaigns do, how voters respond, and what this tells us about the link between voters and government.

## Presidential Elections: Winning the Nomination

No office in American politics is more important than the presidency, and the first step to winning it is to survive the primary process (and then be nominated at the party's convention).

While political scientists and journalists call this the "primary" process, perhaps we should call it the "primary and caucus" process, since some states hold caucuses in addition to or in place of primaries. A primary election operates as described in Chapter 7. In contrast, a **caucus** is a meeting of party followers in which party delegates are picked—often lasting for hours and sometimes held in the dead of winter in a schoolhouse sometimes miles from home. Only the most dedicated partisans attend, and those attending caucuses do tend to be more ideological than those who vote in primaries.<sup>44</sup> To win the nomination, a candidate must succeed in both primaries and caucuses.

The biggest challenge in the primary process for most candidates is that they are largely unknown to the public, so voters' attitudes about them are quite malleable. By 2012, most Americans had an opinion of President Obama; he had been president for four years, and so people's attitudes about him were relatively fixed. But for those running for the first time, that was not the case. For example, many Americans

had never heard of Rick Perry before he became a candidate in 2012, and the same is true for Ted Cruz, Ben Carson, or Bernie Sanders when they ran in 2016. While many Americans knew Donald Trump as a reality TV star, they did not know him as a political candidate prior to his presidential run. Voters' attitudes toward these candidates changed rapidly over the course of the campaign.

Indeed, a frequent pattern in primaries is for a candidate to go from obscurity to popular attention and then fade away again.<sup>45</sup> Initially, the candidate does something to attract media attention. This gives the candidate exposure, which in turn increases his or her name recognition and favorability.<sup>46</sup> This increased attention leads reporters—and opponents—to investigate the candidate's record more carefully. Invariably, this scrutiny turns up negative aspects of the person's past, and then voters turn away from the candidate as they discover both sides of the story.

For example, Ben Carson surged into first place in the fall of 2015. But then after the terror attack in Paris in November, voters became more concerned about national security, an issue where Carson was weak. After that, Carson's numbers dropped and never recovered.<sup>47</sup>

This pattern highlights the crucial role of media in campaigns. One core finding about the media (as we discussed in chapter 6) is that media influence is greatest when people have the least knowledge about an issue.<sup>48</sup> In a primary election, when voters are just getting to know a candidate, the media has a large effect. For example, one of several factors explaining Donald Trump's success in the 2016 primary season is that he received nearly 2 billion dollars in free media coverage during the winter and spring months.<sup>49</sup> Trump was nearly always in the news while other candidates struggled to get airtime, giving him an advantage. By the time of the general election, when voters have a stronger impression of the candidate, the media's effect is less significant, though still very important.

But media coverage is not the only factor that matters in a primary election. Another key factor is **momentum** or the *bandwagon effect*. A candidate's win, especially in an upset victory, generates favorable press coverage—which increases name recognition, approval of the candidate, and an increase in donations. Winning once convinces voters that you can do it again, which changes the dynamics of the election.<sup>50</sup> Barack Obama's 2008 campaign offers a striking example of this phenomenon. Before the 2008 campaign began, pundits and politicians alike assumed Hillary Clinton would walk away easily with the Democratic nomination. But then early in the year, Obama won a surprising upset victory in the Iowa Caucuses, and the momentum swung his way. Though Clinton won the next primary in New Hampshire, and the primary process went on for months, Obama's victory in Iowa convinced voters that he was electable.

**caucus** A meeting of party followers in which party delegates are selected.

**momentum** When a candidate wins (especially an upset win), s/he tends to do better than expected in future contests. Sometimes also called the bandwagon effect.



Mark Wilson/Getty Images

**IMAGE 8-3** Senator Ted Cruz (R-TX) shakes hands with a supporter after announcing his candidacy for the presidency in March 2015.

**retrospective voting**

Voting for a candidate because you like his or her past actions in office.

**prospective voting**

Voting for a candidate because you favor his or her ideas for handling issues.

Any discussion of momentum points to another concern about the primary process: the front-loading of the primary calendar. Every state wants their state's primary to "matter," and state leaders all think the way to do that is to move their state's primary to the front of the calendar. Over time, this has greatly compressed the length of the primary season. In 1968, it took 12 weeks for

the parties to award 50 percent of the delegates in the party's national conventions, but by 2004, it took only five weeks (for Republicans) and six weeks (for Democrats) to award 50 percent of the delegates.<sup>51</sup>

Concerned about the shortened length of the campaign, the parties have pushed back somewhat on front-loading in the last few election cycles, issuing rules about when parties can hold primaries. As a result of these changes, in 2012, it took closer to 10 weeks for 50 percent of the delegates to be awarded.<sup>52</sup>

Some Republicans concluded that the lengthy 2012 primary hurt Mitt Romney, the party's nominee. Therefore, they voted to change the rules for 2016 to re-frontload the process and make it easier for a candidate to capture the nomination early on.<sup>53</sup> Indeed, they put nearly half of the delegates needed to win the nomination up for grabs on a single day (March 1, Super Tuesday). While Donald Trump did not clinch the nomination until late in the process, more than half of the delegates had been awarded by mid-March, six weeks after the primary season began in Iowa. While many Republicans had hoped that these rules would allow an establishment favorite to capture the nomination early—someone like, say, Jeb Bush—they actually helped Donald Trump.<sup>54</sup> As is often the case in politics, reforms have unintended consequences.

Such front-loading may benefit state parties, but it harms voters; they have less time to learn about the candidates. Furthermore, because so much of the campaign happens early in the season, fewer voters get to participate in the process: If the key events are the first few primaries, then those in the later states have effectively no say in the nominees.<sup>55</sup> That said, because states want greater say in the process, front-loading is unlikely to reverse completely—although the rules issued by the parties should limit its growth somewhat.

## 8-5 How Does the Campaign Matter?

Once the candidates secure their party's nomination via the primary process, the general election begins. While the president is actually elected by the electoral college (see Chapter 10), in effect, modern presidential elections come down to the contest on Election Day. The modern general election campaign takes place roughly from Labor Day (or the conventions, if they come first) to Election Day. That several-month campaign drives who will occupy the White House.

It is a truism to say that "campaigns matter." But how do they matter? How do campaigns convince voters to select a particular candidate? We argue that campaigns do this primarily by three related forces: by assigning credit or blame for the state of the nation, by activating latent partisanship, and by allowing voters to judge the qualities of the candidates' character. We take up each one below in turn. For a discussion of how these and other factors mattered in 2016, please see Figure 8.4 and pp. 159–160.

### Assigning Credit or Blame for the State of the Nation

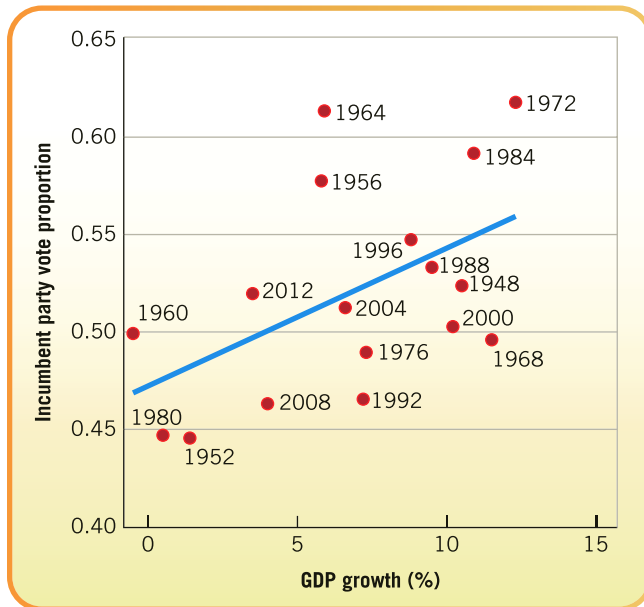
The first thing campaigns do is help voters assign credit or blame for the state of the nation. Voters hold the president responsible for the overall statement of the country: is the economy doing well, are we at war, and so forth. Americans may have hazy, even erroneous, views about monetary policy, business regulation, and defense policy, but they likely have a very good idea about whether unemployment is up or down, prices at the supermarket are stable or rising, or Americans are dying in a foreign war. In short, generally the voters know if the country is headed on the right track or the wrong track.

If things are going well, the incumbent candidate (or if the incumbent is not running, the candidate from the incumbent's party) tries to claim credit for the peace and prosperity the country is experiencing. In contrast, if the country is doing poorly, the challenger tries to pin the blame for the poor state of affairs on the incumbent. Campaigns help voters connect the state of the nation with the party in power—reelect me (or my party) because we have been good stewards, or vote out the incumbent because he has not been one.<sup>56</sup> This is why incumbent Ronald Reagan spoke of "Morning in America" in 1984 when the economy was doing well, but challenger Bill Clinton spoke of "It's the Economy, Stupid!" during a recession in 1992. In 2012, the economy was slowly recovering, and incumbent President Obama argued that his administration deserved some of the credit for steering the nation out of the depths of the recession following the financial crisis (and voters were persuaded by that argument).

This idea—that elections are decided based on punishment or reward for the health of the nation—is known as **retrospective voting**. It is retrospective because voters look back on the previous administration and make a judgment about whether or not they deserve another term in office.<sup>57</sup> In contrast, other voters vote prospectively. *Prospective* means "forward-looking"—we vote prospectively when we examine the rival candidates' views on the issues of the day, and then cast our ballots for the person we think has the best ideas for handling these matters. **Prospective voting** requires a lot of information about issues and candidates, and most who do it are political junkies who are engaged deeply in politics. As a result, prospective voting is a relatively minor factor in most elections, whereas retrospective voting is much more common.

This retrospective effect is so strong that political scientists can use the fundamentals to predict election outcomes reasonably well in advance of the campaign. Figure 8-3 shows the relationship between the health of the economy

**FIGURE 8-3** The Economy and the Presidential Vote, 1948–2012



**Source:** GDP Growth Data from the Bureau of Economic Analysis, <http://www.bea.gov/national/>; election returns come from Dave Leip's Atlas of U.S. Presidential Elections, <http://uselectionatlas.org>.

in the election year (measured by the change in GDP) to the incumbent's vote share.

Each dot in Figure 8-3 represents a presidential election (17 in all, from 1948 to 2012), and the solid line shows the relationship between the two—the so-called regression line. Note that the two are very strongly related: the incumbent, or his party, does much better when the economy is doing better. Voters reward incumbents for a good economy, and punish them for a bad one.

We should not interpret Figure 8-3 to mean that no other issues matter to the campaign beyond the economy. Other issues matter a great deal: crime, foreign policy, education, and many others are debated hotly in elections. Foreign policy and terrorism in particular have long been central to many election campaigns: how the candidate would handle the threat of communism was a staple of nearly every election during the Cold War, and since 9/11, how the president would handle the threat of terrorism has been an issue in every election (especially in 2004, shortly after the United States' decision to invade Iraq). Where the candidates stand on defense, education, abortion, and so forth matter in elections.

But in most years, for most voters, the economy is the central issue. For many years, the Gallup Organization has been asking respondents what the most important problem facing the nation is. When asked during an election year, Americans typically say the economy is the most important problem, often by a substantial margin.<sup>58</sup> In 2012 just before the election, for example, 72 percent said the economy—including the economy broadly, unemployment, the budget deficit, etc.—was the most important problem; and similarly, 69 percent named the economy in 2008.<sup>59</sup> In the cases where the economy is not the major issue, it is either typically because

the economy is booming (as it was in 2000), or we face a major foreign policy challenge (going back to the Cold War). Because the economy is so central to people's lives, and the president is seen as the primary economic steward of the nation, the economy is the core issue in almost every presidential campaign.

The power of retrospective voting highlights an essential truth about elections: the fundamentals matter a great deal. A simple indicator of the health of the economy allows us to predict, with reasonable accuracy, the outcome of the election before the main part of the general election campaign even begins. The underlying health of the nation—the economy, whether we are at war or peace, the popularity of the incumbent (which is tied to the economy)—is really what drives the election.<sup>60</sup>

This highlights an important, and often unappreciated, truth about election polling. As we discussed in chapter 6, the media tends to focus on horserace coverage, debating endlessly who is up and who is down in the polls, especially during election season. But in most circumstances, this daily fluctuation is noise, rather than meaningful movement. Voters *do* shift in response to campaign events, but much less than one would think from the day-to-day shifts in the polls.<sup>61</sup> As we suggested in chapter 6, when you encounter this sort of coverage breathlessly touting the latest shift in the polls, take a step back and ask yourself whether this is likely to be a real change, or whether this is simply random movement.

Of course, we are not advocating that the campaign is irrelevant and that no movement happens in the polls—far from it. The polls do change in response to the campaign; if campaigns were irrelevant, all of the points would lie along the solid line in Figure 8-3 (the regression line), and this chapter would be much shorter. Instead, we see that in some years, the point is quite close to the line, whereas in others, it is further away, suggesting the outcome diverged from our prediction based on the fundamentals—that's the effect of the campaign. Especially in a close election (like in 2000, 2004, 1976, and many others), a well-run campaign really can make the difference between winning and losing.<sup>62</sup> The fundamentals get us in the ballpark of the final outcome, but we need to understand the campaigns to know the eventual outcome.



**IMAGE 8-4** During his successful 2016 presidential campaign, Republican nominee Donald Trump speaks at a rally.



**valence issue** An issue on which everyone agrees, but the question is whether or not the candidate embraces that view.

**positional issues** An issue in which rival candidates have opposing views but that also divides the voters.

## Activating Latent Partisanship

But campaigns do more than help voters assign credit and blame for the state of the nation. They also activate voters' latent partisanship. As we saw in Chapter 7, in recent presidential elections, more than 90% of voters support their party's nominee. This is not just blind obedience. Rather, it reflects a process of the campaign helping voters understand *why* they should

support their party's nominee. As Professor James Campbell put it, "campaigns remind Democrats why they are Democrats rather than Republicans and remind Republicans why they are Republicans rather than Democrats."<sup>63</sup>

Campaigns do this through a variety of methods, such as campaign appearances, advertisements, and debates, as we discuss later. Through all of these methods, however, candidates stress the issues that appeal to, and activate, their partisans. These typically are the issues where the public sees them as being more competent than the other party: For Democrats, these are social welfare issues, and for Republicans, national security issues. While both parties discuss the economy (as seen above), beyond that, they typically emphasize these types of issues.<sup>64</sup> This helps cue voters why they belong to one party or the other, and makes them more likely to support their party's candidate.

Of course, we should not conclude from this discussion that voters never support the opposing party's candidate—clearly, they do. Even in 2012, approximately 10 percent of partisans supported the other party's nominee for president (see Chapter 7).

Why do we see these defections? There are two main reasons. First, voters may be out of step with their party on an issue, and therefore will defect to the other party. For example, in 2004, some Republican voters were displeased that President George W. Bush put in place a ban on embryonic stem cell research, and instead supported Senator John Kerry.<sup>65</sup> Second, as we discussed above, if voters are unhappy with their party's stewardship of the nation, they are likely to vote for the other party. In both cases, defection, rather than party loyalty, is the likely result.

Understanding how campaigns activate partisanship also helps to clarify two other dynamics of electoral campaigns. First, over the course of the campaign, we see the number of undecided voters decline. Much of this decline comes from partisans returning home to their party; watching the campaign, they are reminded of why they are a Democrat or a Republican, and they move to support their candidate.<sup>66</sup> Many who are undecided early in the campaign just have not had their latent partisanship activated.

Second, this also reminds us that some voters do not identify with a party—they are Independents. As we saw in Chapter 7, in contemporary American presidential elections,

both parties will win approximately 90 percent of their party's supporters. But we also saw that neither party has enough supporters to win by just appealing to its own base. Both parties also need to court Independent voters if they want to win elections.

## Judging the Candidates' Character

A third major component of a campaign is helping voters judge the character of the candidates. Voters care about the issues, but they also care about a candidate's character. Voters not only want a candidate who takes the right positions on the issues, but who has the right traits as well. They want someone who provides strong leadership, has integrity, and displays empathy (i.e., cares about people like them).<sup>67</sup> Voters rely on these sorts of judgments because they give them a clue as to how a president will behave in office. No one can know all the issues that a new president will face once in office. But if a candidate has these broad traits, then he or she will be more likely to be up to the challenge.

Contemporary campaigns often invoke these traits. In 2012, President Obama routinely critiqued Mitt Romney, the wealthy founder of Bain Capital, as a plutocrat out of touch with ordinary Americans' needs, indicating a lack of empathy. In the exit polls, voters said that President Obama was more in touch with people like them by a 10-point margin.<sup>68</sup> Even when controlling for factors like the economy, partisanship, and other key issues, these types of character evaluations influence a voter's decision at the ballot box.<sup>69</sup>

Character evaluations such as these are an example of a **valence issue**.<sup>70</sup> A valence issue is one where everyone agrees; the question is whether or not the candidate embraces that view. For example, everyone wants the president to be a strong leader, to have integrity, and to display empathy; the question is whether or not a particular candidate has those qualities. Likewise, everyone wants a robust economy and a strong national defense; the question is whether a particular candidate's plan will help us get there. In contrast, there are also **positional issues**—ones in which the rival candidates have opposing views on a question that also divides the voters. Many of the issues we think about are positional issues: gun control, abortion, gay marriage, tax cuts, and many others. As this section has made clear, both types of issues matter in elections.

## 8-6 How Do Voters Learn About the Candidates?

We reviewed what campaigns do for voters: they help them assign credit or blame for the state of the nation, they activate voters' latent partisanship, and they help voters judge the character of the candidates. But how do campaigns actually convey this information to voters? How do voters learn which candidate should be credited for a booming economy, or which they don't like because he lacks integrity? They do so through campaign communication. This can take many forms, but usefully fall into two broad classes: campaign-created communications (e.g., advertisements, speeches, etc.),



## HOW THINGS WORK

### 2016 Election

The 2016 presidential race was full of surprises from start to finish. No one predicted the rise of Donald Trump, no one predicted he would beat out 16 other candidates in the Republican primary, and no one—not even his own polling team—predicted he would win the Presidential election. Indeed, on the day of the election, most poll-based forecasts put the odds of Secretary Clinton winning at more than 90%. Interestingly, forecasting models based on the state of the economy (discussed earlier in this chapter) predicted a narrow Republican win, but everyone assumed that 2016 would be an aberration, and trusted the poll-based forecasts. That turned out to be a mistake.

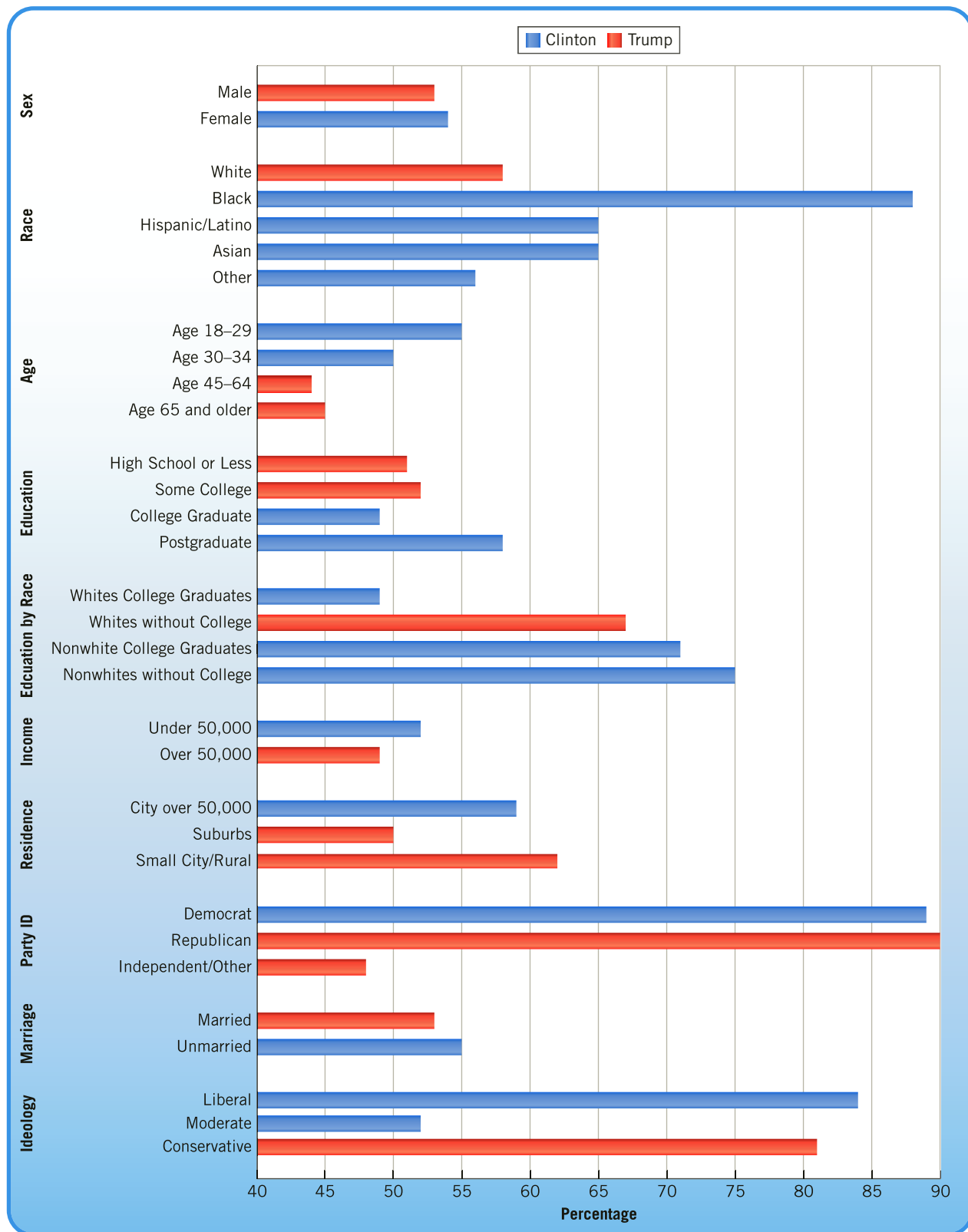
What factors seemed to matter the most, at least in the immediate aftermath of the election? Using the exit poll data, Figure 8-4 shows several important trends in voter support for Clinton and Trump in 2016. A few factors clearly stand out. First, partisan loyalty is crucial. Clinton and Trump both received nearly 90% of the votes from those that identified with their party, just slightly less than Romney and Obama's support from their fellow partisans in 2012. But just 5–6 weeks before the election, Trump had far lower levels of party loyalty among Republicans. Over the last few weeks of the campaign, Republican voters returned to the fold and supported their candidate. To be clear, many of these voters disliked Trump: more than 20% of those who supported him thought that he lacked the qualifications to be president, and a similar number thought he was untrustworthy. But while they disliked Mr. Trump, they disliked Secretary Clinton even more, so they ultimately supported him.

Second, the Obama coalition from 2008 and 2012 did not support Secretary Clinton to the same extent that they did President Obama. Secretary Clinton did worse with African-Americans, Latinos, Asian Americans, and young people than President Obama did in 2012, in some cases by double digits. While many people argued that Trump's margin among white voters was decisive, it was not: white voters favored him by 21%, nearly identical to the 20% advantage Mitt Romney held with them in 2012. And while there was a large gender gap, Secretary Clinton's advantage with

women was nearly identical to President Obama's in 2012: President Obama won the votes of 53% of women in 2012, and Secretary Clinton won 54% in 2016. But Mr. Trump won the votes of 53% of men, a 5-point gain relative to Romney in 2012.

Third, 2016 highlighted an enormous “education gap,” especially among white voters. Traditionally, white college-educated voters have strongly favored the Republican Party, but in 2016, they swung toward the Democrats by 10 percentage points. But whites without a college degree swung even more sharply toward the Republicans in this election, moving 14 percentage points toward Republicans. Whether this education gap persists into the future remains to be seen.

Finally, 2016 marks only the 5<sup>th</sup> time in American history—and the second time since 2000—when a candidate wins the Electoral College but loses the popular vote. In the wake of the election, some have called, yet again, to do away with the Electoral College and move to a national popular vote. While the Electoral College is unpopular, it is unlikely to be removed any time soon.

**FIGURE 8-4** 2016 Exit Poll Results

**Source:** 2016 Exit Polls, as reported by the New York Times and CNN. Because of Third Party candidates, in some categories neither Clinton or Trump got a majority of voters.



and campaign events (e.g., debates and conventions). They both help inform voters, but in somewhat different ways.

## Campaign Communications

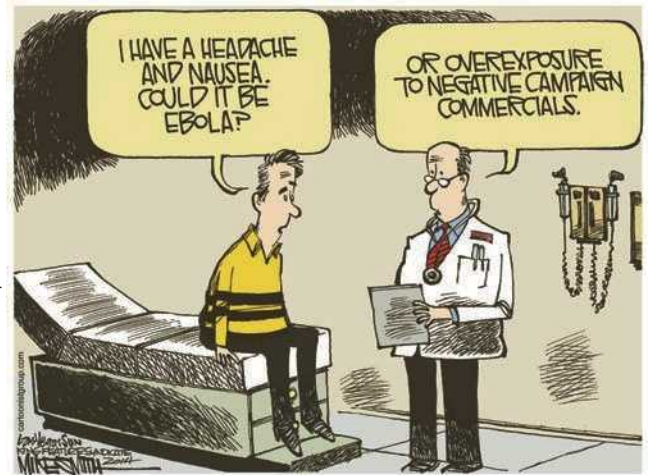
As we saw earlier in the chapter, presidential campaigns now cost in the billions of dollars, several times what they cost even a few decades ago. The single biggest expense in 2012 was for campaign advertisements; campaigns spent more than \$1 billion on them. Advertising would include various methods of communicating with voters—most notably through television, though it would also include other methods such as direct mail, social media platforms, and so forth.

The lion's share of this money was spent on television campaign advertisements. Both campaigns spent lavishly on advertisements, especially in pivotal states such as Florida, Ohio, Pennsylvania, Iowa, and Colorado. Many areas of key states saw both campaigns run several thousand ads over the course of the campaign.<sup>71</sup> Indeed, in many areas, one cannot watch TV during an election year without being bombarded by television advertisements. To see the ads that were aired in 2012 and other elections, visit the Living Room Candidate (<http://www.livingroomcandidate.org>).

Anyone who has seen campaign advertisements on television knows that many, if not most, share two features: they appeal to emotions, and they make negative attacks. Emotional appeals have become ubiquitous. A comprehensive study carefully analyzed thousands of political ads.<sup>72</sup> A plurality, it found, was purposely designed (everything from the images used to the music playing in the background) to appeal mainly to voters' fears (impending war, losing a job, etc.). A smaller but significant fraction focused more on stirring positive emotions (patriotism and community pride). Interestingly, such ads do not simply work on the uninformed. Instead, they have larger effects on those who are the most informed and engaged with politics, suggesting that even the most "sophisticated" among us can fall prey to such ads.<sup>73</sup>

Second, most political ads are negative. Simply put, a negative advertisement is an advertisement that directs the viewers' attention to the downsides of a candidate rather than their positive qualities; such ads are sometimes called attack ads. In 2012, negative ads from President Obama emphasized the fact that Bain Capital—the company founded by Mitt Romney—outsourced many jobs during his tenure there, suggesting that Romney was not sympathetic to the plight of ordinary workers. Negative ads from the Romney campaign emphasized the growth of government debt and sluggish economic recovery during the president's first term. Such ads dominate the airwaves; according to an analysis by the Wesleyan Media Project, nearly two-thirds of advertisements in 2012 were negative. This is up sharply over time; in 2004, less than half of ads were negative, and in 2000, less than one-third were negative.<sup>74</sup>

Are such advertisements harmful? Many assume so. But this is perhaps premature because it conflates a negative ad—highlighting a candidate's shortcomings on the issues—with a deceptive or dirty ad, one that distorts the truth or



**IMAGE 8-5** Many blame negative campaign ads for voters' unhappiness with campaigns.

engages in personal attacks on a candidate. Just because an ad is negative does not mean it is dirty or deceptive; one can critique and be truthful.<sup>75</sup> While some negative advertisements devolve into personal attacks and falsehoods, many of them are ads that critique an opponent's stance on the issues or record in office. While mudslinging is not helpful, ads that portray where the candidates stand on the issues are.

As a result, negative advertisements (at least those that focus on issues) are typically more informative than positive advertisements. Positive advertisements tend to traffic in happy platitudes with little substantive detail, whereas negative ads tend to offer actual critiques on the issues.<sup>76</sup> Negative advertisements can be a valuable tool for learning about the issues.

But whether an ad appeals to our emotions or not, and whether it is positive or negative, the real question is: Do advertisements work? In particular, we can ask three questions: do advertisements change who turns out to vote, do they inform voters, and do they change voters' assessments of the candidates?

First, advertisements do not seem to increase turnout very much.<sup>77</sup> Many other factors determine whether or not someone turns out to vote, and political advertising contributes little beyond these factors. Second, as we saw above, ads, especially when they discuss substantive issues, can inform voters and help them learn where the candidates stand on the issues of the day.<sup>78</sup> Finally, advertisements also shape how voters think about the candidates. Advertisements shape people's assessments of the candidates' traits (factors such as strong leadership, integrity, and empathy, discussed earlier), and they also seem to impact overall candidate likability.<sup>79</sup> It is fair to say that advertising works.

But it is important to point out, however, that advertising does not determine election outcomes. This is true for two reasons. First, these effects are modest, not massive. The studies cited above find that advertisements change the outcome by a few percent at most, and these effects decay very rapidly. Scholars can detect the effects of an ad for a

day or two after it airs, but it fades away after that.<sup>80</sup> Even ads that are repeated again and again have relatively small effects in the end. Simply running more advertisements will not fundamentally reshape the election.

Second, at the presidential level, the effects from one campaign's advertisements cancel out the effects from the other campaign's advertisements because the campaigns are relatively evenly matched.<sup>81</sup> Part of the reason candidates spent more than a billion dollars on ads is that they need to match their opponent's ads: if Romney ran ads in an area, then Obama responded in kind (and vice versa). This escalates the cost quickly without necessarily changing the outcome very much, as the ads cancel each other out. Neither side can back down, however, because that would give their opponent an edge (ads from one side that are not answered by the other side could have a larger effect). The end result is a great deal of spending without much of an effect on the overall outcome.

## Campaign Events

Beyond advertisements and other forms of communication from the campaigns, voters also learn about the candidates from the campaign events themselves. In particular, two campaign events are particularly important to voters: the parties' nominating conventions and the presidential debates. These events matter because they are the way in which most people actually encounter the candidates in their own words beyond 30-second television ads. For many voters, this is their longest sustained interaction with the candidates.

As we saw in Chapter 7, the party's convention is the formal mechanism used to nominate their candidate for president (though the decision is determined largely by the voters in the primary process). The convention is the party's chance to make its case to the voters for why their nominee should win the election. The convention culminates with the nominee giving his or her acceptance speech, but in the days leading up to it, other party luminaries and rising stars also make the case for the nominee and the party. Such events are especially valuable for the party because they get to speak to voters directly without any rebuttal from the other side. Furthermore, not only does the party get to broadcast its message, typically it also gets highly favorable press coverage during the event, which will also move voters toward the party's nominee in the days and weeks following the convention.<sup>82</sup>

As a result of this sustained, one-sided, favorable coverage, candidates traditionally got a sustained "bump" from the convention; their poll numbers went up following the convention, though this boost quickly dissipates in most years. For example, in 2016, Donald Trump gained two points following the Republican convention, and Hillary Clinton gained four points following the Democratic one.<sup>83</sup>

The debates also serve as an important source of voter information about the candidates. Typically the debates are the largest audience a candidate reaches during the campaign; in 2012, approximately 70 million Americans watched the first debate between Barack Obama and Mitt Romney (almost double the number who watched either candidate's acceptance speech at the conventions).



Pool/Getty Images News/Getty Images

**IMAGE 8-6** Donald Trump and Hillary Clinton participate in the second presidential debate in 2016.

The debates also give the candidates an opportunity to show how they function under pressure, as they have to tackle questions from the moderator and audience and still get their message across.

Much like the conventions, the media's coverage of the event strongly colors how people respond to the event. While millions do tune in to watch the debate itself, they also see pundits discuss it in the hours, days, and weeks that follow. Indeed, the post-debate commentary often can be just as influential for voters as the actual debate itself.<sup>84</sup> The media typically declares one candidate the winner, and then that candidate receives a boost in his standing in the polls.

This bump to the winner's poll numbers is usually quite modest, however—only a few points at most. Why do debates move opinion less than the conventions? The debates take place much later in the election season (usually in October) and, by that point, most viewers have made a decision and are unlikely to be swayed. Indeed, for many Americans who have picked a candidate, debates are mostly an opportunity to cheer for him or her.<sup>85</sup> That does not mean, however, that debates do not matter. The evidence suggests that debates can matter for any remaining undecided voters, as well as for wavering partisans (those who are not currently supporting their party's nominee).<sup>86</sup>

Beyond the debates and conventions, journalists are always trying to claim that various events are "game changers"; this rally or that speech will be the one that fundamentally alters the dynamic of the election. One study of the 2012 election found that over the course of the campaign, journalists called 68 different events "game changers," when most were anything but.<sup>87</sup> In the end, most campaign events do not really change the dynamics of the race because the dynamics are driven by the underlying fundamentals. Campaigns—and campaign events—certainly matter, but they matter more at the margins.

## 8-7 Congressional Elections

So far in the chapter, we have focused almost exclusively on the presidential election. But this is not the only election in American politics. We also go to the polls to elect members



Tom Williams/CQ-Roll Call Group/Getty Images

**IMAGE 8-7** Senator Marco Rubio (R-FL) meets with supporters on the campaign trail.

of the House and Senate, not to mention dozens of state and local officials. Congressional elections are very similar to presidential elections in many ways, and many of the factors we reviewed earlier—the health of the economy, partisanship, and judgments about the candidates’ character—matter a great deal here as well. But there are also a number of important differences. Here, we focus on three particularly key differences that give Congressional elections their own unique dynamics.

## The Incumbency Advantage

In presidential elections, the **incumbent** (i.e., the sitting president) typically receives 50–55 percent of the vote; most presidential elections are close, hard-fought contests, as we mentioned above. In contrast, in Congressional elections, many incumbents win with an overwhelming share (often more than 60 percent) of the vote. In most election years, the vast majority of incumbents—often more than 90 percent—are reelected to Congress. In the 2012 elections, 90 percent of House incumbents and 91 percent of Senate incumbents were reelected. In 2014, the House reelection rate was 95 percent, and in the Senate, “only” 82 percent of incumbents were reelected; recall that several Democratic Senators went down to defeat, such as Kay Hagan in North Carolina, Mark Pryor in Arkansas, and Mark Begich in Alaska. Since the mid-1960s, the incumbent reelection rate has never dropped below 80 percent in the House or 60 percent in the Senate (see Chapter 9 for more on this over-time trend). Scholars estimate that House candidates today get several percent more of the vote than an otherwise similar challenger would (with Senate candidates getting a similar, albeit smaller, boost).<sup>88</sup> Clearly, incumbents do quite well in legislative elections.

Political scientists have studied this phenomenon extensively, and argue that this **incumbency advantage** reflects a number of factors that favor incumbents over challengers in Congressional elections. We discuss these factors in more detail in Chapter 9 on Congress, but we briefly review several of the main factors here.

One important factor is the members’ ability to do constituency service. Members of Congress—unlike the president—are very likely to actively provide services to those

that they represent. Members can help a constituent track down a lost Social Security check, help apply for a small business loan, or, more generally, intervene on a constituent’s behalf with a federal agency. Indeed, almost every member of Congress has a section on his or her website to encourage constituents to reach out and contact them if they need help with some aspect of the federal government. Members of Congress want to be of service to those they represent.

Second, members of Congress also have the ability to claim credit for every bridge, road, and project in their district. They can point to their ability to help secure funds for the district as a reason to reelect them year after year. In both cases, this helps members build a reservoir of support that is not tied to partisanship, but rather to the members themselves. If a Democratic member helps a Republican constituent apply for a government program, then that constituent is more likely to vote for that member of Congress despite their partisan differences.<sup>89</sup>

Members of Congress also have an important name recognition advantage. Members of Congress are much better known than most challengers. After all, the incumbent Congressperson has already been elected once, and can command media attention more easily. Furthermore, they can use the franking privilege (the ability of members of Congress to send mail to constituents) to communicate their accomplishments in office to their constituents. Such efforts boost the name recognition and standing of incumbent members of Congress.

Finally, members enjoy an enormous fundraising advantage over challengers. Sitting members of Congress can raise funds throughout their term, and often have much more cash than their potential opponents (who typically struggle to raise money). Despite efforts to limit the influence of money in politics (discussed below), members of Congress almost always outspend their challengers. All of these reasons—and many more—help to explain why members of Congress are so frequently reelected.

## Redistricting and Gerrymandering

Since 1911, the size of the House has been fixed at 435 members, except for a brief period when it had 437 members owing to the admission of Alaska and Hawaii to the Union in 1959. Once the size was decided, it was necessary to find a formula for performing the painful task of apportioning seats among the states as they gained and lost population. The Constitution requires such reapportionment every 10 years (a process also known as redistricting). A more or less automatic method was selected in 1929 based on a complex statistical system that has withstood decades of political and scientific testing. After each Census, the number of districts

**incumbent** The person already holding an elective office.

**incumbency advantage** The tendency of incumbents to do better than otherwise similar challengers, especially in congressional elections.



***gerrymandering***

Drawing the boundaries of legislative districts in bizarre or unusual shapes to favor one party.

***surge and decline***

The tendency for the president's party to do better in presidential years when he is at the top of the ticket (the surge), but to do worse when he is not because many voters are less enthusiastic and stay home (the decline).

***coattails*** The alleged tendency of candidates to win more votes in an election because of the presence at the top of the ticket of a better-known candidate, such as the president.

in each state change as some states lose districts, while others gain them. After the most recent Census, the biggest winners were Texas (+4 seats) and Florida (+2), while the biggest losers were New York and Ohio (both lost 2 seats).

When such reapportionment and redistricting takes place, many complain there has been ***gerrymandering***, which means drawing a district boundary in some bizarre or unusual shape to make it easy for the candidate of one party to win election in that district. This would seem to help incumbents win reelection. One district can be made heavily Democratic by packing many Democratic voters into it, thereby making it easier for a Democrat to win reelection in that district. There is some truth to this claim, but only some, as there are many competing pressures put on drawing districts. Many states (and the courts) mandate that districts be of roughly equal population, follow natural

political boundaries (like towns), be contiguous (i.e., be able to travel from any point in the district to any other), and so forth. This puts significant constraints on what districts can be drawn. So while gerrymandering impacts Congressional elections, the effects are less than many claim.<sup>90</sup>

## On-Year and Off-Year Elections

The U.S. holds presidential elections every four years, but congressional elections every two years. In general, the president's party loses seats in the midterm election. In every midterm election since 1938, the president's party has lost seats except for 1998 and 2002.

What explains this striking pattern? Political scientists call this pattern ***surge and decline***. In a presidential election year, the president's supporters show up at the polls to vote for the president. They also vote for other candidates from the president's party (such as members of Congress), a phenomenon known as ***coattails***.<sup>91</sup> This generates a surge in support for the president's fellow partisans. As a result, when a new president is elected, typically he brings more members of his own party with him to Congress. For example, after the 2008 elections, 21 more Democrats joined the House, and after 2012, the Democrats gained eight more seats.

But in the subsequent midterm election, without the appeal of the president at the top of the ticket, many of those

voters stay home, and support for the party's candidates declines. With the president at the top of the ticket, his partisans flock to the polls, and his party does better with Independents. But in the midterm elections, without the president running, his partisans stay home, especially those who are more marginal voters.<sup>92</sup> The surge in the on-year election means that the president's party picks up seats normally held by the other party; but in the off-year election, without the president at the top of the ticket, those seats are more difficult to hold. So while Obama helped bring more Democrats into office in 2008 and 2012, in the two midterm elections of 2010 and 2014, his party's fortunes declined; Democrats lost 63 seats in the House of Representatives in 2010, and 13 seats in 2014. Relative to the 2008 and 2012 electorates, the 2010 and 2014 electorates were more conservative and Republican, older, whiter, and more male.<sup>93</sup> These groups tend to favor Republicans somewhat, so Republicans did somewhat better in Obama's two midterm elections. In the 2006 midterm elections, with Bush in the White House, the electorate was more pro-Democratic, and so Democrats did better (gaining 31 seats and control of Congress). Because of this pattern of surge and decline, the party controlling the White House typically loses seats in the midterm election.

## 8-8 Campaign Finance: Regulating the Flow of Political Money

Nearly every modern observer of political campaigns notes that large sums of money now flow through presidential and congressional elections. Throughout the chapter, we have explained what this money buys and how that matters to election outcomes. But that still leaves several important questions about the effects of money on elections. Here we try to answer three questions: Where does campaign money come from? What rules govern how it is raised and spent? What has been the effect of campaign finance reform?

### The Sources of Campaign Money

Presidential candidates get part of their money from private donors and part from the federal government; congressional candidates get all of their money from private sources. In the presidential primaries, candidates raise money from private citizens and interest groups. The federal government will provide matching funds, dollar for dollar, for all monies raised from individual donors who contribute no more than \$250. (To prove they are serious candidates, they must first raise \$5,000 in each of 20 states from such small contributors.) The government previously gave a lump-sum grant to each political party to help pay the costs of its nominating convention, though President Obama signed legislation ending that program in 2014. In the general election, the government pays all the costs (up to a legal limit) of major-party candidates and part of the costs of minor-party candidates (those winning between 5 and 25 percent of the vote).

This system of public funding of presidential elections was put in place starting with the 1976 election, as a response to

the Watergate scandal (see below). However, in recent elections, more and more candidates have opted out of the public funding program. In 2000, George W. Bush became the first candidate to opt out of public funding in the primaries (but not the general election); in 2008, Obama became the first candidate to opt out of public funding during the general election; and in 2012, both major party nominees turned down public funding for the general election. By opting out of matching funds, candidates are free to spend as much money as they can raise privately; by accepting the federal matching funds, candidates must abide by spending limits. In 2016, only one candidate accepted public financing: former Maryland Governor Martin O'Malley, who ran for the Democratic nomination. Every other candidate—including Clinton and Trump in both the primary and general election—rejected public financing. What happens with this system in the future remains to be seen.

Congressional candidates get no government funds; all their money must come out of their own pockets or be raised from individuals, interest groups (PACs), or the political parties. Contrary to what many people think, most of that money comes from—and has always come from—individual donors. Because the rules sharply limit how much any individual can give directly to candidates, most donations are relatively modest amounts (\$100 or \$200) given by ordinary people, rather than a few rich plutocrats.<sup>94</sup>

## Campaign Finance Rules

During the 1972 presidential election, men hired by President Nixon's campaign staff broke into the headquarters of the Democratic National Committee in the Watergate office building. An alert security guard caught them. The subsequent investigation disclosed that the Nixon people had engaged in dubious or illegal money-raising schemes, including taking large sums from wealthy contributors in exchange for appointing them to ambassadorships. Many individuals and corporations were indicted for making illegal donations (since 1925, it had been against the law for corporations or labor unions to contribute money to candidates, but the law had been unenforceable). Some of the accused had given money to Democratic candidates as well as to Nixon.

When the break-in was discovered, the Watergate scandal unfolded. It had two political results: President Nixon was forced to resign, and a new campaign finance law was passed.

Under the new law, individuals could not contribute more than \$1,000 to a candidate during any single election (the Supreme Court upheld these limits in the *Buckley v. Valeo* decision). Corporations and labor unions had for many decades been prohibited from spending money on campaigns, but the new law created a substitute: **political action committees (PACs)**, which we discussed in Chapter 7.

These legislative changes produced two problems. The first was **independent expenditures**. A PAC, a corporation, or a labor union could spend whatever it wanted supporting or opposing a candidate, so long as this spending was “independent”—that is, not coordinated with or made at the direction of the candidate's wishes. Simply put, independent expenditures are ordinary advertising directed at or against candidates.



## HOW WE COMPARE

### Public Funding for National Political Campaigns

In the United States, national political campaigns are funded primarily through private donations by individuals, political parties, and interest groups. Only presidential campaigns are eligible to receive public funding, and even there, candidates may opt not to accept the funds to avoid the restrictions of a federal cap on spending. Despite efforts since the 1970s to regulate campaign contributions, American democracy has a longstanding tradition of applying the First Amendment protection of free speech to campaign spending, a position recently endorsed by the Supreme Court. Other advanced industrialized democracies take a different view.

Many democracies around the world rely much more heavily on public funding for elections than the United States, and have stricter regulations on campaign contributions and expenditures. Australia, Germany, France, and Israel all provide public funds for political campaigns, typically granting funds to parties that received a certain percentage of votes in the previous election. France and the United Kingdom ban paid political ads, and both countries along with Israel provide free broadcasting time for candidates. All three countries also impose limits on campaign spending.

How do campaign finance rules affect elections? In many ways, campaigns in the United States run much longer than in other democracies. The countries listed above typically hold national elections in about six weeks, whereas the first candidates for the 2016 presidential race announced their candidacies in March 2015, 20 months before the election. This is because public funding typically strengthens political parties, whose leaders decide which candidates they will support. Unlimited campaign contributions may permit relatively unknown candidates to prevail in party nominating contests without initial support from the top leadership. But winning requires time and money in the United States, and the financial costs increase in every election cycle. Is money a form of free speech? Democracies disagree.

**Sources:** Law Library of Congress, “Campaign Finance: Comparative Summary”; Brennan Center for Justice, “Breaking Free with Fair Elections: A New Declaration of Independence,” March 2007; Debate between Bradley Smith and Thomas E. Mann, “Campaign Finance Reloaded,” *Los Angeles Times*, July 2007.

The second was **soft money**. Under the law, individuals, corporations, labor unions, and other groups could give unlimited amounts of money to political parties provided the money was not used to back candidates by name. But the money could be used in ways that helped candidates by

**political action committees (PACs)**

A committee set up by a corporation, labor union, or interest group that raises and spends campaign money from voluntary donations.

**independent expenditures**

Spending by political action committees, corporations, or labor unions to help a party or candidate but done independently of them.

**soft money** Funds obtained by political parties that are spent on party activities, such as get-out-the-vote drives, but not on behalf of a specific candidate.

**527 organizations**

Organizations under section 527 of the Internal Revenue Code that raise and spend money to advance political causes.

financing voter registration and get-out-the-vote drives. Many saw such activities, however, as de facto spending on candidates; for example, by showing people a photo of a candidate, encouraging people to vote for that candidate's party, but not naming that candidate, the ad could be paid for with soft money. Such activities therefore became controversial.

## A Second Campaign Finance Law

*Reform* is a tricky word. We like to think it means fixing something gone wrong. But some reforms can make matters worse. For example, the campaign finance reforms enacted in the early 1970s helped matters in some ways by ensuring that all campaign contributors would be identified by name. But they made things worse in other ways by, for example, requiring candidates to raise small sums from many donors. This made it harder for challengers to run (incumbents are much better known and raise more money) and easier for wealthy candidates to run because, under the law as interpreted by the Supreme

Court, candidates can spend as much of their own money as they want.

After the 2000 campaign, a strong movement developed in Congress to reform the reforms of the 1970s. The result was the Bipartisan Campaign Finance Reform Act of 2002, which passed easily in the House and Senate and was signed by President Bush. The new law made three important changes.

First, it banned soft money contributions to national political parties from corporations and unions. After the federal elections in 2002, no national party or party committee could accept soft money. Any money the national parties get must come from “hard money”—that is, individual donations or PAC contributions as limited by federal law. Many feared this would substantially weaken parties, as they had become dependent on soft money donations to fund their operations. But, as we discussed in Chapter 7, the parties changed their tactics and are raising more money today than ever before.

Second, the limit on individual contributions was raised from \$1,000 per candidate per election to \$2,000 (and indexed that limit to rise with inflation; the limit for the 2015–2016 election cycle was \$2,700).

Third, “independent expenditures” by corporations, labor unions, trade associations, and (under certain circumstances) nonprofit organizations are restricted sharply. Now none of these organizations can use their own money to refer to a clearly identified federal candidate in any advertisement during the 60 days preceding a general election or the 30 days preceding a primary contest. (PACs can still refer to candidates in their ads, but of course PACs are restricted to “hard money”—that is, the amount they can spend under federal law.)

While the Supreme Court initially upheld almost all of the law in 2002 in *McConnell v. Federal Election Commission* (see chapter 5), later cases have overturned various parts of the law. In 2007, an ad by a right-to-life group urged people to write to Senator Russell Feingold to convince him to vote for certain judicial nominees, but it did not tell people how to vote. The Court decided this was “issue advocacy” protected by the First Amendment and so could not be banned by the McCain-Feingold law (*Federal Election Commission v. Wisconsin Right to Life*).

Two more recent decisions have relaxed campaign finance rules further. In the 2010 *Citizens United* decision (*Citizens United v. Federal Election Commission*), the Court narrowly decided, in a five-to-four decision, to overturn the ban on corporate and union funding of campaign ads. The decision kept in place the limits on donations to candidates; but it allows corporations, unions, and other groups to spend unlimited funds calling for the support or defeat of particular candidates.

In 2014, in *McCutcheon v. Federal Election Commission*, the Court overturned the aggregate biennial limits on contributions to national parties and candidates. By law, individuals were limited in how much they could give in total to candidates, parties, and other political committees. So, prior to the McCutcheon ruling, individuals could give no more than \$48,600 in total to all candidates. Given the limits discussed above, someone could only give the federal limit to 18 candidates. McCutcheon kept the limits on how much anyone could give to a particular candidate, but overturned the rules on the aggregate donation limits. So now an individual may give the federal limit (currently \$2,700) to as many candidates as he or she likes; the decision made a parallel set of rulings with respect to parties.

If the past is any guide, neither recent changes nor the existing legal maze will do much to keep individuals, PACs, party leaders, and others from funding the candidates they favor.

## New Sources of Money

If money is, indeed, the mother's milk of politics, efforts to make the money go away are not likely to work. The Bipartisan Campaign Reform Act, once enforced, prompted people immediately to find other ways to spend political money.

The most common were **527 organizations**. These groups, named after a provision of the Internal Revenue Code, are designed to permit the kind of soft money expenditures once made by political parties. Under the law as it is now interpreted, 527 organizations can spend their money on politics provided they do not coordinate with a candidate or





## LANDMARK CASES

### Financing Elections

- ***Buckley v. Valeo* (1976):** Held that a law limiting contributions to political campaigns was constitutional but that one restricting a candidate's expenditures of his or her own money was not.
- ***McConnell v. Federal Election Commission* (2002):** Upheld 2002 Bipartisan Campaign Reform Act (popularly known as "McCain-Feingold" law) prohibiting corporations and labor unions from running ads that mention candidates and their positions for 60 days before a federal general election.
- ***Federal Election Commission v. Wisconsin Right to Life, Inc.*** Held that issue ads may not be prohibited before a primary or general election.
- ***Citizens United v. Federal Election Commission* (2010):** Overturned part of 2002 law that had prohibited corporate and union funding of campaign ads.
- ***McCutcheon et al. v. Federal Election Commission* (2014):** Overturned aggregate limits on individual contributions to candidates and national parties.

lobby directly for that person. As early as the 2004 elections, 527 organizations raised and spent over one-third of a billion dollars.

Two other outside groups have joined 527 organizations in recent years. First, there are the **super PACs** (technically known as "independent expenditure-only committees"). These super PACs were born after the *Citizens United* decision and several other related court decisions and rule changes. Super PACs can raise and spend unlimited amounts of money from corporations, labor unions, individuals, and other groups, whereas traditional PACs have strict limits on how much they can accept from any individual. Super PACs must operate independently of campaigns and candidates; they may not be "in concert or cooperation with" the candidate, his or her campaign organization, or a political party. So, for example, a super PAC television ad for a given candidate must be funded and fashioned without that candidate, his or her campaign managers, or the candidate's party leaders being involved in any way.

Super PACs have become major sources of campaign dollars in recent elections. In 2011–2012, according to an April 2013 report by the Federal Election Commission, the "independent-expenditure only" committees spent nearly \$800 million—more than was spent by traditional corporate, union, and trade PACs combined. With super PACs, all PACs spent more than \$2.1 billion, and PACs outspent the party committees, which spent "only" about \$1.6 billion. In 2014, according to the Center for Responsive Politics, 1,322 super PACs raised over \$695 million and spent about \$348

million.<sup>95</sup> To put these 2014 numbers in perspective, in that same election, the Democratic Congressional Campaign Committee and the National Republican Congressional Committee together spent only \$134 million, or less than 40 percent of the spending from super PACs.

Second, **501(c)4 groups** (also called social welfare organizations) also have emerged as important political funders. Named after the section of the tax code that created them, 501(c)4 groups have existed for many years, and are dedicated to promoting social welfare. Many community and civic groups fall into this category, such as civic leagues and many local volunteer fire departments, along with groups like the Sierra Club, the AARP, and the National Rifle Association. Such groups are allowed to engage in politics as long as politics is not their focus: No more than 50 percent of their money can be spent on politics. Such groups have an attractive feature that super PACs do not. Super PACs (like a regular PAC) must disclose their donors, but a 501(c)4 group does not. Therefore, such groups sometimes are called "dark money" groups, since the identity of the donors is not known. Political spending by these groups is on the rise. According to the Center for Responsive Politics, spending by these groups grew from only about 5 million in 2006 to more than 300 million in 2012.<sup>96</sup> The ultimate impact of this money, however, remains to be seen.

**super PAC** A group that raises and spends unlimited amounts of money from corporations, unions, and individuals but cannot coordinate its activities with campaigns in any way.

**501(c)4 group** A social welfare organization that can devote no more than 50 percent of its funds to politics. Sometimes referred to as "dark money" groups because they do not have to disclose their donors.

### Money and Winning

But does all of this money change election outcomes? At the presidential level, the answer is not really. In the primary process, it does not change the winner. After all, Sheldon Adelson spent millions in the 2012 Republican primary to support Newt Gingrich, and Gingrich was not the nominee. Other mega-donors spent lavishly on candidates like Rick Santorum, who also lost. Similarly, in 2016, Jeb Bush and his Super PAC spent 130 million dollars without winning a single primary or caucus. The eventual Republican nominee, Donald Trump, spent proportionately very little money (though he did receive a huge boost from free media, as we discussed above). The ability of wealthy donors to keep a campaign afloat, however, could change the dynamics of the race in the future.

In the general election for president, money is typically not an issue: Both candidates are typically relatively evenly matched, and their spending tends to track one another. For example, the single largest campaign expenditure for presidents is television advertisements and, as we discussed earlier, one party's advertisements largely cancel out the other's—generating a small, but important, net effect.



**IMAGE 8-8** Republican candidate Mitt Romney meets with donor Sheldon Adelson during the 2012 election.

As we have seen, three main factors typically shape presidential elections: political party affiliation, the state of the economy, and the character of the candidates. While the candidate who spends more typically wins, that need not be the case. Clinton spent more than twice as much as Trump in 2016 but still lost the election.

At the congressional level, however, money matters a great deal more. In many congressional elections, spending is highly uneven. As we discussed above, incumbents can raise money much more easily than challengers can, and this sets up an asymmetry. Of course there's an irony here; challengers, not incumbents, need money if they are to be competitive. Challengers are not well known, and need to spend money to spread their message to the voters. While there is some debate about how much incumbent spending helps the incumbent, the literature is clear that challenger spending greatly benefits challengers.<sup>97</sup> If challengers are to win, they need access to money.

## 8-9 The Effects of Elections on Policy

To the candidates, and perhaps to the voters, the only interesting outcome of an election is who won. To a political scientist, the interesting outcomes are the broad trends in winning and losing and what they imply about the attitudes of voters, the operation of the electoral system, the fate of political parties, and the direction of public policy.

Over time, we have observed many swings in the relative electoral strength of the parties. In the late 19<sup>th</sup> century, the parties were competitive—then came several decades where first the Republicans and then the Democrats were the dominant party. Since the 1950s, the parties are once again both competitive nationally, and the presidency frequently has switched parties.

Still, cynics complain that elections are meaningless: No matter who wins, crooks, incompetents, or self-serving politicians still hold office. The more charitable argue that elected officials usually are decent enough, but that public

policy remains more or less the same no matter which official or party is in office.

This cynical view is, in our opinion, wrong. American public policy does change in response to the pressure of elections.

In a parliamentary system with strong parties, such as that in the United Kingdom, an election often can have a major effect on public policy. When the Labour Party won office in 1945, it put several major industries under public ownership and launched a comprehensive set of social services, including a nationalized health care plan. Its ambitious and controversial campaign platform was converted, almost item by item, into law. When the Conservative Party returned to power in 1951, it accepted some of these changes but rejected others (e.g., it denationalized the steel industry).

American elections, unless accompanied by a national crisis such as a war or a depression, rarely produce changes of the magnitude of those that occurred in Britain in 1945. The constitutional system within which our elections take place was designed to moderate the pace of change—to make it neither easy nor impossible to adopt radical proposals. Elections do produce changes in policy, though they are often quite modest in normal circumstances.

Yet with dramatic elections, even the American system can produce dramatic changes. The election of 1860 brought to national power a party committed to opposing the extension of slavery and Southern secession; it took a bloody war to vindicate that policy. The election of 1896 led to the dominance of a party committed to high tariffs, a strong currency, urban growth, and business prosperity—a commitment that was not altered significantly until 1932. The election of that year led to the New Deal, which produced the greatest single enlargement of federal authority since 1860. The election of 1964 gave the Democrats such a large majority in Congress (as well as control of the presidency) that it launched an extraordinary number of new policies of sweeping significance—Medicare and Medicaid, federal aid to education and to local law enforcement, two dozen environmental and consumer protection laws, the Voting Rights Act of 1965, a revision of the immigration laws, and a new cabinet-level Department of Housing and Urban Development. In view of all these developments, it is hard to argue that the pace of change in our government is always slow or that elections never make a difference.

Why then do we so often think elections make little difference? It is because public opinion and the political parties enter a phase of consolidation and continuity between periods of rapid change. During this phase, the changes are digested, and party leaders adjust to the new popular consensus—which may or may not evolve around the merits of these changes. During the 1870s and 1880s, Democratic politicians had to come to terms with the failure of the Southern secessionist movement and the abolition of slavery. During the 1900s, the Democrats had to adjust again, this time to the fact that national economic policy was going to support industrialization and urbanization, not farming. During the 1940s and 1950s, the Republicans had to learn to accept the popularity of the New Deal.

Elections in ordinary times are not “critical”—they do not produce any major party realignment, they are not fought out over a dominant issue, and they provide the winners with no clear mandate. In most cases, an election is little more than a retrospective judgment on the record of the incumbent president and the existing congressional majority. If times are

good, incumbents win easily; if times are bad, incumbents can lose—even though their opponents may have no clear plans for change. But even a “normal” election can produce dramatic results if the winner is a person such as Ronald Reagan, who helped give his party a distinctive political philosophy, or Barack Obama, the nation’s first African American president.

## LEARNING OBJECTIVES .....

### 8-1 Discuss how American voter turnout compares to other advanced industrialized democracies, and how it has changed over time.

American voter turnout generally is lower than in other advanced industrialized democracies. But it is important to note that American elections differ from their European counterparts along many dimensions. Americans elect far more officials, have far more frequent elections, and are required to register to vote (rather than being automatically enrolled). While registration and voting both have been made easier in recent years, many Americans still do not vote.

### 8-2 Outline what factors explain who participates in politics.

Many factors determine participation, but we identified several key factors: having the resources (such as time, income, and civic skills), the psychological engagement with politics, being mobilized, being motivated, and having experiences with government programs.

### 8-3 Describe the factors that influence the presidential primaries.

In primaries, candidates are much less well known, and many briefly surge in the polls and then fade away just as quickly. Because voters do not know much about the candidates yet, media coverage plays a larger role. Momentum also matters a great deal; candidates who win early in the process often, but not always, have an advantage in later contests.

### 8-4 Explain how campaigns shape the outcome of presidential elections.

Campaigns shape outcomes by focusing on three key factors for voters: assigning credit or blame for the state of the nation (especially the state of the national economy), activating voters’ latent partisanship, and allowing voters to judge the character of the candidates. These three factors—the state of the nation, the voters’ partisanship, and the candidates’ character—are among the most important in shaping a voter’s decision at the ballot box.

### 8-5 Summarize how voters learn about the candidates in elections.

Much of what voters learn about candidates comes through the media, especially through campaign advertisements (which are the single largest expense for most national campaigns). Such advertisements affect what voters know and feel about the candidates. In most elections, because advertisements are roughly equally balanced, the net effect is rather small. Citizens also learn from various campaign events—in particular, party conventions and debates.

### 8-6 Describe the key differences between presidential and congressional elections.

There are three key differences between congressional and presidential elections. First, there’s the incumbency advantage; congressional incumbents typically do better because of the perks of their office. Second, because House districts are redrawn every decade, district boundaries can change, with implications for members’ behavior (though with fewer implications than many believe). Finally, because of the surge and decline in voter turnout, the president’s party almost always does worse in midterm elections.

### 8-7 Summarize the history of campaign finance reform efforts, and explain the current state of campaign finance regulation.

The modern campaign finance system dates to the aftermath of the Watergate era, and places strict limits on donations. Numerous reform efforts have been proposed and passed, but none have altered the role of money in politics significantly. Today, much of the concern centers around outside groups (such as super PACs) and their role in the process.

### 8-8 Describe how elections shape public policy.

When there is a dramatic shift as a result of an election (such as in 1860, 1932, or 1964), policy can change dramatically as a result. But even in more normal times, who wins elections has important implications for the policies they enact.



## TO LEARN MORE .....

### Information for Voters:

Election Assistance Commission (registration information): <http://www.eac.gov>

Voter turnout statistics: <http://www.census.gov/hhes/www/socdemo/voting/>

### Information on Campaigns:

Federal Election Commission (campaign finance): [www.fec.gov](http://www.fec.gov)

Project Vote Smart (information on candidate positions): [www.vote-smart.org](http://www.vote-smart.org)

Electoral college: [www.archives.gov/federal-register/electoral-college/](http://www.archives.gov/federal-register/electoral-college/)

Green, Donald P., and Alan S. Gerber. *Get Out the Vote!: How to Increase Voter Turnout*. 2nd ed. Washington, D.C.: Brookings Institution Press, 2008. Excellent review of

the evidence on what works—and what doesn't—to get more people to the polls.

Sides, John, and Lynn Vavreck. *The Gamble: Choice and Chance in the 2012 Presidential Election*. Princeton, NJ: Princeton University Press, 2013. An excellent summary of what political scientists know about elections, and what that tells us about the 2012 race.

Verba, Sidney, Kay Lehman Schlozman, and Henry Brady. *Voice and Equality: Civic Volunteerism in American Politics*. Cambridge, MA: Harvard University Press, 1995. A masterful treatise on why people participate in politics.

Vavreck, Lynn. 2009. *The Message Matters: The Economy and Presidential Campaigns*. Princeton, NJ: Princeton University Press, 2009. Explains why the economy drives presidential elections (because campaigns work to assign credit/blame for the economy).



## CHAPTER 9

# Congress

### LEARNING OBJECTIVES

- 9-1** Contrast congressional and parliamentary systems.
- 9-2** Trace the evolution of Congress in American politics.
- 9-3** Discuss who serves in Congress and what influences their votes.
- 9-4** Summarize the organization of Congress.
- 9-5** Explain how a bill becomes a law.
- 9-6** Discuss possibilities for congressional reform.

**partisan**

**polarization** A vote in which a majority of Democratic legislators opposes a majority of Republican legislators.

If you are like most Americans, you trust the Supreme Court, respect the presidency whether or not you like the president, and dislike Congress—even if you like your own representative and senators. Congress is the most unpopular branch of government, but it is also the most important one; you cannot understand the national government without first understanding Congress. Glance at the Constitution and you will see why; the first four and a half pages are about Congress, while the presidency gets only a page and a half and the Supreme Court about three-quarters of a page.

To the Framers of the Constitution, the bicameral (two-chamber) Congress was “the first branch.” They expected Congress to wield most of the national government’s powers, including its most important ones like the “power of the purse” (encompassing taxation and spending decisions) and the final authority to declare war. They understood Congress as essential to sustaining federalism (guaranteeing two senators to each state without regard to state population) and maintaining the separation of powers (ensuring that no lawmaker would be allowed to serve in either of the other two branches while in Congress). They also viewed Congress as the linchpin of the system of checks and balances, constitutionally empowered as it was to both override presidential vetoes and determine the structure and the jurisdiction of the federal judiciary, including the Supreme Court.

However, most contemporary Americans and many experts think of Congress not as the first branch but as “the broken branch”—unable to address the nation’s most pressing domestic, economic, and international problems in an effective way; unduly responsive to powerful organized special interests; awash in nonstop campaign fundraising and other activities that many believe border on political corruption; and unlikely to fix itself through real reforms.<sup>1</sup>

Consistent with this “broken branch” view, in recent decades less than one-third of Americans typically approve of Congress. In the 2000s, approval ratings in the 20s or 30s were the norm. Since mid-2011, public approval of Congress has dropped into the teens (rising just above 20 percent briefly in December 2012), and after the government shut-down in October 2013, it fell below 10 percent. In early 2016, Congress’s approval rating hovered in the mid-teens.<sup>2</sup>

Many academic analysts and veteran Washington journalists echo the popular discontent with Congress as the broken branch, but the experts focus more on two things—the first a paradox, and the second a puzzle. The paradox is that most Americans consistently disapprove of Congress yet routinely reelect their own members to serve in it. In political scientist Richard F. Fenno’s famous phrase, if “Congress is the broken branch then how come we love our congressmen so much more than our Congress?”<sup>3</sup> Despite public approval ratings that are frequently dismal, almost all congressional incumbents who have sought reelection have won it, most by comfortable margins.

Even in elections rife with “anti-incumbent” public sentiment, where voters effect a change in party control of one

or both chambers of Congress, incumbents prevail and dominate the institution. For example, in the 2010 midterm elections, Democrats suffered historic losses overall in the House, but most Democratic and Republican incumbents who sought reelection won it. In the 112th Congress (2011–2012), 80 percent of House members, and 70 percent of senators were incumbents. In 2014, well over 90 percent of House incumbents won reelection, but the percentage of Senate incumbents who won reelection dropped to just above 80 percent—which was not surprising, given that party control of the chamber changed. Even though they have been fussing over it for several decades now, political scientists are still not sure how to answer Fenno’s question and resolve the paradox.

The puzzle is why the post-1970 Congress has become even more polarized by partisanship and divided by ideology, and whether this development reflects ever-widening political cleavages among average Americans, or instead constitutes a disconnect between the people and their representatives on Capitol Hill.

## THEN

During 1890–1910, about two-thirds of all votes in Congress evoked a party split, and in several sessions more than half the roll calls found about 90 percent of each party’s members opposing the other party.<sup>4</sup> But such polarization faded over the first few decades of the 20th century, and by the 1970s, such **partisan polarization** in Congress was very much the exception to the rule. Well into the 1960s, Congress commonly passed major legislation on most issues on a bipartisan basis, and there were liberal members and conservative members in leadership positions in both parties and in both chambers. Such liberal and conservative voting blocs as existed typically crossed party lines, like the mid-20th-century conservative bloc featuring Republicans and Southern Democrats. Congressional leaders in each party usually were veteran politicians interested mainly in winning elections, dispensing patronage, obtaining tangible benefits for their own districts or states and constituents, and keeping institutional power and perks. Even members with substantial seniority did not get the most coveted committee chairmanships unless they were disposed to practice legislative politics as the art of the possible and the art of the deal. This meant forging interparty coalitions, and approaching interbranch (legislative–executive) relations in ways to promote bipartisan bargains and compromises—and doing so even on controversial issues, and even when congressional leaders were not all in the same party as the president.

## NOW

When the 91st Congress ended in 1970, the more liberal half of the House had 29 Republicans and the more conservative half of the House had 59 Democrats.<sup>5</sup> By the time the 105th Congress ended in 1998, the more liberal half of the House had only 10 Republicans while the more conservative half of the House had zero Democrats.<sup>6</sup> (Zero!) In recent years, liberal Republicans and conservative Democrats became virtually extinct in both the House and the Senate; even the most



liberal Republican is now to the right of the most conservative Democrat. As a result, party-line votes are increasingly common. For example, in 2010, The Patient Protection and Affordable Care Act (better known as Obamacare) proposed by Democrats passed in Congress without a single Republican voting for it.

Obamacare is not the only example of a deep partisan division in Congress. In 2011, Congress hit an all-time high: Republicans in the House voted with their party's caucus 91 percent of the time, which was a new record for party unity. The record was short-lived; in 2013, that figure crept up to 92 percent. Democrats are no less united; in the Senate, 94 percent of Democrats voted with their party's caucus in 2013.<sup>7</sup> Future Congresses are likely to see these figures creep even higher. All of this makes it clear that members of Congress are deeply polarized. While we saw in chapter 6 that the mass public has sorted but not polarized, the same cannot be said for our elected officials.

We will explore the reasons for this congressional polarization later in the chapter. But three things are clear. First, Congress has never embodied the Founders' fondest hopes for the first branch perfectly: not when the First Congress met in 1789–1791 (and wrangled endlessly over the Bill of Rights); not during the decades before, during, and just after the Civil War; not during the late 19th century through 1970; and certainly not since. James Madison envisioned members of Congress as “proper guardians of the public weal”—public-spirited representatives of the people who would govern by mediating intelligently and resolving conflicts dispassionately among the nation's competing financial, religious, and other interests.<sup>8</sup> Representatives or senators who might instead fan partisan passions and refuse to compromise were disparaged by Madison as selfish, unenlightened, or “theoretic politicians” (what today we might call “extremists,” “hyper-partisans,” or “ideologues”).<sup>9</sup> If judged by the Founders' highest aspirations for the first branch and its members, Congress has always been something of a broken branch.

Second, Congress is now home to ideologically distinct political parties that each seem more unified than ever with respect to how their respective members vote, but the body still does not come close to matching the near-total party unity that has been typical in the national legislatures of the United Kingdom and other parliamentary democracies.

Third, Madison and the other Framers expressly rejected a parliamentary system like Great Britain's in favor of a system featuring both a separation of powers and checks and balances. They understood the fundamental differences between a “congress” and a “parliament,” and so must every present-day student who hopes to really understand the U.S. Congress.

## 9-1 Congress Versus Parliament

The United States (along with many Latin American nations) has a congress; the United Kingdom (along with most Western European nations) has a parliament. A hint as to the difference between the two kinds of legislatures can be found in the original meanings of the words. *Congress* derives from a Latin term that means “a coming together,” a meeting, as of

representatives from various places. *Parliament* comes from a French word, *parler*, which means “to talk.”

There is of course plenty of talking—some critics say there is nothing *but* talking—in the U.S. Congress, and certainly members of a parliament represent their local districts to a degree. But the differences implied by the names of the lawmaking groups are real ones, with profound significance for how laws are made and how the government is run. These differences affect two important aspects of lawmaking bodies: how one becomes a member and what one does as a member.

Ordinarily, a person becomes a member of a parliament (such as the British House of Commons) by persuading a political party to put his or her name on the ballot. Though usually a local party committee selects a person to be its candidate, that committee often takes suggestions from national party headquarters. The local group selects as its candidate someone willing to support the national party program and leadership. In the election, voters in the district choose not between two or three personalities running for office, but between two or three national parties.

By contrast, a person becomes a candidate for representative or senator in the U.S. Congress by running in a primary election. As we discussed in Chapter 7, parties may try to influence the outcome of primary elections, but they cannot determine them.

As a result of these different systems, a parliament tends to be made up of people loyal to the national party leadership who meet to debate and vote on party issues. A congress, on the other hand, tends to be made up of people who regard themselves as independent representatives of their districts or states and who, while willing to support their party on many matters, expect to vote as their (or their constituents') beliefs and interests require.

Once they are in the legislature, members of a parliament discover they can make only one important decision—whether or not to support the government. The government in a parliamentary system such as that of the United Kingdom consists of a prime minister and various cabinet officers selected from the party that has the most seats in parliament. As long as the members of that party vote together, that government will remain in power. Should members of a party in power in parliament decide to vote against their leaders, the leaders lose office, and a new government must be formed. With so much at stake, the leaders of a party in parliament have a powerful incentive to keep their followers in line. They insist that all members of the party vote together on almost all issues. If someone refuses, the penalty is often drastic; the party does not renominate the offending member in the next election.

Members of the U.S. Congress do not select the head of the executive branch of government—that is done by the voters when they choose a president. Far from making members of Congress less powerful, this makes them more powerful. Representatives and senators can vote on proposed laws without worrying that their votes will cause the government to collapse, and without fearing that a failure to support their party will lead to their removal from the ballot in the next election. Indeed, despite record levels of party unity in recent

years, members of both parties have rebuked their leaders yet remained in office. For example, conservative Republicans effectively forced Republican John Boehner to resign as Speaker of the House in 2015. While Boehner—and his successor as speaker, Paul Ryan—may have been unhappy with this behavior, they could not remove these Republicans from office (or really do all that much to punish them).

Congress has independent powers, defined by the Constitution, that it can exercise without regard to presidential preferences. Political parties do not control nominations for office, and thus they cannot discipline members of Congress who fail to support the party leadership. Because Congress is constitutionally independent of the president, and because party discipline is highly imperfect, individual members of Congress are free to express their views and vote as they wish. They are also free to become involved in the most minute details of law-making, budget making, and supervision of the administration of laws. They do this through an elaborate set of committees and subcommittees.

A real parliament, such as that in Britain, is an assembly of party representatives who choose a government and discuss major national issues. The principal daily work of a parliament is debate. A congress, such as that in the United States, is a meeting place for the representatives of local constituencies—districts and states. Members of the U.S. Congress can initiate, modify, approve, or reject laws, and with the president they share supervision of the administrative agencies of the government. The principal work of a congress is representation and action, most of which takes place in committees.

What this means in practical terms to the typical legislator is easy to see. Since members of the British House of Commons have little independent power, they get rather little in return. They are paid a modest salary, have a small staff,

are allowed only limited sums to buy stationery, and can make a few free local telephone calls. Each is given a desk, a filing cabinet, and a telephone, but not always in the same place.

By contrast, a member of the U.S. House of Representatives, even a junior member, has power and is rewarded accordingly. For example, in 2015, each member earned a substantial base salary (\$174,000) plus generous health care and retirement benefits, and was entitled to a large office (or “clerk-hire”) allowance to pay for about two dozen staffers. (Each chamber’s majority and minority leaders earned \$193,400 a year, and the Speaker of the House earned \$223,500.) Each member also received individual allowances for travel, computer services, and the like. In addition, each member could mail newsletters and certain other documents to constituents for free using the “franking privilege.” Senators, and representatives with seniority, received even larger benefits. Each senator is entitled to a generous office budget and legislative assistance allowance and is free to hire as many staff members as he or she wishes with the money. These examples are not given to suggest that members of Congress are over-rewarded, but only that their importance as individuals in our political system can be inferred from the resources they command.

Because the United States has a congress made up of people chosen to represent their states and districts, rather than a parliament made up to represent competing political parties, no one should be surprised to learn that members of the U.S. Congress are more concerned with their own constituencies and careers than with the interests of any organized party or program of action. And since Congress does not choose the president, members of Congress know that worrying about the voters they represent is much more important than worrying about whether the president succeeds with his programs. Taken together, these two factors



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AP Photo

**IMAGE 9-1** Three powerful Speakers of the House: Thomas B. Reed (1889–1891, 1895–1899) (left), Joseph G. Cannon (1903–1911) (center), and Sam Rayburn (1941–1947, 1949–1953, 1955–1961) (right). Reed put an end to a filibuster in the House by refusing to allow dilatory motions and by counting as “present”—for purposes of a quorum—members in the House even though they were not voting. Cannon further enlarged the Speaker’s power by refusing to recognize members who wished to speak without Cannon’s approval and by increasing the power of the Rules Committee, over which he presided. Cannon was stripped of much of his power in 1910. Rayburn’s influence rested more on his ability to persuade than on his formal powers.

mean that Congress tends to be a decentralized institution, with each member more interested in his or her own views and those of his or her voters than with the programs proposed by the president.

Indeed, the Founders designed Congress in ways that almost inevitably make it unpopular with voters. Americans want government to take action and follow a clear course of action, and they respond to strong leaders. Americans dislike political arguments, the activities of special-interest groups, and the endless pulling and hauling that often precede any congressional decision. But the people who feel this way are deeply divided about what government should do: Be liberal? Be conservative? Spend money? Cut taxes? Support abortions? Stop abortions? Since they are divided, and since members of Congress must worry about how voters feel, it is inevitable that on controversial issues Congress will engage in endless arguments, worry about what interest groups (who represent different groups of voters) think, and work out compromise decisions. When it does those things, however, many people feel let down and say they have a low opinion of Congress.

Of course, a member of Congress might explain all these constitutional facts to the people, but not many members are eager to tell their voters that they do not really understand how Congress was created and organized. Instead, they run for reelection by promising voters they will go back to Washington and “clean up that mess.”

## 9-2 The Evolution of Congress

The Framers chose to place legislative powers in the hands of a congress rather than a parliament for philosophical and practical reasons. They did not want to have all powers

concentrated in a single governmental institution, even one that was elected popularly, because they feared such a concentration could lead to rule by an oppressive or impassioned majority. At the same time, they knew the states were jealous of their independence and would never consent to a national constitution if it did not protect their interests and strike a reasonable balance between large and small states. Hence, they created a **bicameral** (two-chamber) **legislature**—with a House of Representatives elected directly by the people, and a Senate consisting of two members from each state, chosen by the legislatures of each state.

Though “all legislative powers” were vested in Congress, those powers would be shared with the president (who could veto acts of Congress), be limited to powers conferred explicitly on the federal government, and, as it turned out, be subject to the power of the Supreme Court to declare acts of Congress unconstitutional. But never doubt that the Framers saw Congress as the first branch. Table 9-1 lists the many powers of Congress enumerated in Article 1, Section 8 of the Constitution.

For decades, critics of Congress complained that the body cannot plan or act quickly. They are right, but two competing values are at stake: centralization versus decentralization. If Congress acted quickly and decisively as a body, then there would have to be strong central leadership, restrictions on debate, few opportunities for stalling tactics, and minimal committee interference. If, on the other hand, the interests of individual members—and the constituencies they represent—were protected or enhanced,

**bicameral legislature** A lawmaking body made up of two chambers or parts.

**TABLE 9-1 The Powers of Congress**

- To lay and collect taxes, duties, imposts, and excises
- To borrow money
- To regulate commerce with foreign nations and among the states
- To establish rules for naturalization (i.e., becoming a citizen) and bankruptcy
- To coin money, set its value, and punish counterfeiting
- To fix the standard of weights and measures
- To establish a post office and post roads
- To issue patents and copyrights to inventors and authors
- To create courts inferior to (below) the Supreme Court
- To define and punish piracies, felonies on the high seas, and crimes against the law of nations
- To declare war
- To raise and support an army and navy and make rules for their governance
- To provide for a militia (reserving to the states the right to appoint militia officers and to train the militia under congressional rules)
- To exercise exclusive legislative powers over the seat of government (the District of Columbia) and other places purchased to be federal facilities (forts, arsenals, dockyards, and “other needful buildings”)
- To “make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States.”

(Note: This “necessary and proper,” or “elastic,” clause has been generously interpreted by the Supreme Court, as explained in Chapter 12.)



then there would have to be weak leadership, rules allowing for delay and discussion, and many opportunities for committee activity.

Though there have been periods of strong central leadership in Congress, for much of the 20th century the general trend has been toward decentralizing decision making and enhancing the power of the individual member at the expense of the congressional leadership. That said, the rise in polarization has somewhat reversed that trend in recent years, though leaders today are less powerful than those of the late 19th and early 20th centuries (the apogee of the speaker's power).

This decentralization may not have been inevitable. Most American states have constitutional systems quite similar to the federal one—yet in many state legislatures, such as those in New York, Massachusetts, and Indiana, the leadership is quite powerful. In part, the position of these strong state legislative leaders may be the result of the greater strength of political parties in some states than in the nation as a whole. In large measure, however, it is a consequence of permitting

state legislative leaders to decide who shall chair what committee and who shall receive what favors.

The House faces fundamental problems: it wants to be big (it has 435 members) and powerful, and its members want to be powerful as individuals and as a group. But being big makes it hard for the House to be powerful, unless some small group is given the authority to run it. If a group runs the place, however, the individual members lack much power. Individuals can gain power, but only at the price of making the House harder to run and thus reducing its collective power in government. There is no lasting solution to these dilemmas, and so the House will always be undergoing changes.

The Senate does not face any of these problems (Table 9.2 summarizes some key differences between the House and the Senate). At 100 members, it is small enough that it can be run without giving much authority to any small group of leaders, and no time limits need be placed on how long a senator can speak. This meant there was never anything like a Rules Committee that controlled the amount of

**TABLE 9-2** Comparing the House of Representatives and the Senate

House		Senate
<ul style="list-style-type: none"> <li>At least 25 years of age (when seated, not elected)</li> <li>Citizen of the United States for at least seven years</li> <li>Inhabit the state from which elected (custom but <i>not</i> the Constitution requires that a representative live in the district he or she represents)</li> </ul>	← Qualifications →	<ul style="list-style-type: none"> <li>At least 30 years of age (when seated, not elected)</li> <li>Citizen of the United States for at least nine years</li> <li>Inhabit the state from which elected</li> </ul>
435	← Number of Members →	100
2 Years	← Length of Terms →	6 Years
<ul style="list-style-type: none"> <li>Legislative authority</li> <li>Impeach</li> <li>Power of the purse</li> </ul>		<ul style="list-style-type: none"> <li>Legislative authority</li> <li>Conduct impeachment trials</li> <li>Review and approve presidential nominees</li> </ul>
<ul style="list-style-type: none"> <li>Elect the president in the case of an Electoral College tie</li> <li>Approve appointments to the vice presidency</li> <li>Approve treaties that involve foreign trade</li> <li>Investigation and oversight</li> <li>Declare war</li> </ul>	← Special Powers →	<ul style="list-style-type: none"> <li>Approve treaties made by the president (by two-thirds vote) and amend treaties</li> <li>Investigation and oversight</li> </ul>
<ul style="list-style-type: none"> <li>Many rules, more formal</li> <li>May expel members of the House with two-thirds vote</li> <li>May censure members of the House</li> <li>Decide disputed House elections</li> </ul>	← Procedures →	<ul style="list-style-type: none"> <li>Few rules, less formal</li> <li>May expel members of the Senate with two-thirds vote</li> <li>May censure members of the Senate</li> <li>Filibuster and cloture</li> <li>Decide disputed Senate elections</li> </ul>
<ul style="list-style-type: none"> <li>“Privileged speech”—members of Congress cannot be sued or prosecuted for anything they say or write in connection with their legislative duties</li> </ul>	← Privileges →	<ul style="list-style-type: none"> <li>“Privileged speech”—members of Congress cannot be sued or prosecuted for anything they say or write in connection with their legislative duties</li> </ul>

debate. Further, the voters did not elect senators until the 20th century. Prior to that, they were picked by state legislatures. Thus senators often were the leaders of local party organizations, with an interest in funneling jobs back to their states.

The big changes in the Senate came not from any fight about how to run it (nobody ever really ran it), but from a dispute over how its members should be chosen. For more than a century after the Founding, members of the Senate were chosen by state legislatures. Though often these legislatures picked popular local figures to be senators, just as often there was intense political maneuvering among the leaders of various factions, each struggling to win (and sometimes buy) the votes necessary to become senator. By the end of the 19th century, the Senate was known as the Millionaires' Club because of the number of wealthy party leaders and businessmen in it. There arose a demand for the direct, popular election of senators.

Naturally the Senate resisted, and without its approval the necessary constitutional amendment could not pass Congress. When some states threatened to demand a new constitutional convention, the Senate feared that such a convention would change more than just the way in which senators were chosen. A protracted struggle ensued, during which many state legislatures devised ways to ensure that the senators they picked would already have won a popular election. The Senate finally agreed to a constitutional amendment that required the popular election of its members, and in 1913 the Seventeenth Amendment was approved by the necessary three-fourths of the states. Ironically, given the intensity of the struggle over this question, no great change in the composition of the Senate resulted; most of those members who had first been chosen by state legislatures managed to win reelection by popular vote.

The other major issue in the development of the Senate was the filibuster. A **filibuster** is a prolonged speech, or series of speeches, made to delay action in a legislative assembly. It had become a common—and unpopular—feature of Senate life by the end of the 19th century. It was used by liberals and conservatives alike and for lofty as well as self-serving purposes. The first serious effort to



**IMAGE 9-2** Several Senate Democrats led a filibuster in June 2016 to call for stronger gun control measures.

restrict the filibuster came in 1917, after an important foreign policy measure submitted by President Wilson had been talked to death by, as Wilson put it, “eleven willful men.” Rule 22 was adopted by a Senate fearful of tying a president’s hands during a wartime crisis.

The rule provided that debate could be cut off if two-thirds of the senators present and voting agreed to a “cloture” motion (it has since been revised to allow 60 senators to cut off debate). Two years later, it was first invoked successfully when the Senate voted cloture to end, after 55 days, the debate over the Treaty of Versailles.

Despite the existence of Rule 22, the tradition of unlimited debate remains strong in the Senate, and examples of famous filibusters abound. One—by former South Carolina Senator Strom Thurmond—lasted for more than 24 hours (Thurmond was filibustering a proposed Civil Rights Act). Consistent with arguments about Congress being a broken branch, there have been record numbers of filibusters (or threatened filibusters) in the last few congresses.

**filibuster** An attempt to defeat a bill in the Senate by talking indefinitely, thus preventing the Senate from taking action on the bill.



## CONSTITUTIONAL CONNECTIONS

### From Convention to Congress

Article I of the Constitution (on Congress) is several times longer than Article II (on the presidency and executive branch) and Article III (on the federal judiciary) combined. The Framers treated Congress as “the first branch” of American national government. As evidenced by the records of the debates among the 55 men that convened the Constitutional Convention, they had good philosophical reasons for treating the new republic’s new legislature with special care. Besides, most of the delegates were themselves former legislators: 41 of the 55 had served, or at the time of the Convention, were still serving, as members of the Continental Congress.

Moreover, 28 of the 55 delegates would go on to serve in the new Congress created by Article I: four served in both the House and the Senate; nine served in the House only; and 15 served in the Senate only. Among those that went on to serve in the House was James Madison, the Constitution’s chief intellectual architect. Madison would also go on to serve as Secretary of State (under President Thomas Jefferson) and, of course, as the nation’s fourth president (succeeding Jefferson).

**Source:** Adapted from the U.S. National Archives and Records Administration, “The Founding Fathers: A Brief Overview,” 2013.

**majority-minority districts**

Congressional district where a majority of voters are racial/ethnic minorities.

**descriptive representation**

when citizens are represented by elected officials from their same racial/ethnic background

**substantive representation**

ability of citizens to have policies that they favor enacted into law

## 9-3 Who Is in Congress?

With power so decentralized in Congress, the kind of person elected to it is especially important. Since each member exercises some influence, the beliefs and interests of each individual affect policy. Viewed simplistically, most members of Congress seem the same; the typical representative or senator is a middle-aged white Protestant male lawyer. If all such persons usually thought and voted alike, that would be an interesting fact, but they do not, and so it is necessary to explore the great diversity of views among seemingly similar people.

## Gender and Race

Congress gradually has become less male and less white. Between 1950 and 2015, the number of women in the House increased from nine to 84 (plus four delegates, who represent U.S. territories or Washington, D.C.) and the number of African Americans from two to 44 (plus two delegates). There are also 32 Latino members (plus one delegate and the Resident Commissioner of Puerto Rico).<sup>10</sup>

Until recently, the Senate changed much more slowly (see Figure 9-1). Before the 1992 election, there were no African Americans and only two women in the Senate. But in 1992, four more women, including one black woman, Carol Mosely Braun of Illinois, were elected. Two more were elected in 1994, when a Native American, Ben Nighthorse Campbell of Colorado, also became a senator. In the 114th Congress, there are 20 women, 2 African Americans, and 3 Latinos serving in the U.S. Senate.

Part of the increase in African American and Latino members of Congress comes from the creation of **majority-minority districts**. In such districts, a majority of residents are racial or ethnic minorities. These districts are designed to allow said minorities to elect candidates of choice, and were created as a result of litigation surrounding the Voting Rights Act. Most often, the candidate of choice is someone from their racial or ethnic group; for example, districts with a majority of African American voters typically, though not always, elect an African American candidate. Such districts have played a key role in bringing more racial and ethnic minorities into Congress. As a result, such districts certainly increase **descriptive representation**, when a minority officeholder represents minority constituents. Such descriptive representation is valuable because someone from a minority group typically will be best positioned to understand and represent the needs of that group.<sup>11</sup>

Yet some scholars claim that such districts may harm minority interests inadvertently. To create majority-minority districts, many racial and ethnic minorities need to be packed into a single district, and as a result, surrounding districts typically have fewer racial and ethnic minorities. This has two consequences. First, members in surrounding districts, because they have fewer minority constituents, have less incentive to respond to the needs of minority voters.<sup>12</sup> Second, these surrounding districts become less likely to elect Democrats to office.<sup>13</sup> This follows because these districts have fewer racial and ethnic minorities, who typically strongly support Democratic candidates. For example, there is evidence that the creation of new majority-minority districts following the 1990 census helped to elect more Republicans to Congress.<sup>14</sup> Because Democrats often, but not always, support policies that are more in line with the preferences of most racial and ethnic minorities, a Congress with fewer Democrats is less likely to pass legislation favored by racial and ethnic minorities (for example, on policies such as affirmative action). This suggests that while such districts increase symbolic representation, they might decrease **substantive representation**: the ability of voters (in this case, minority voters) to elect officials that will enact policies in line with their preferences.

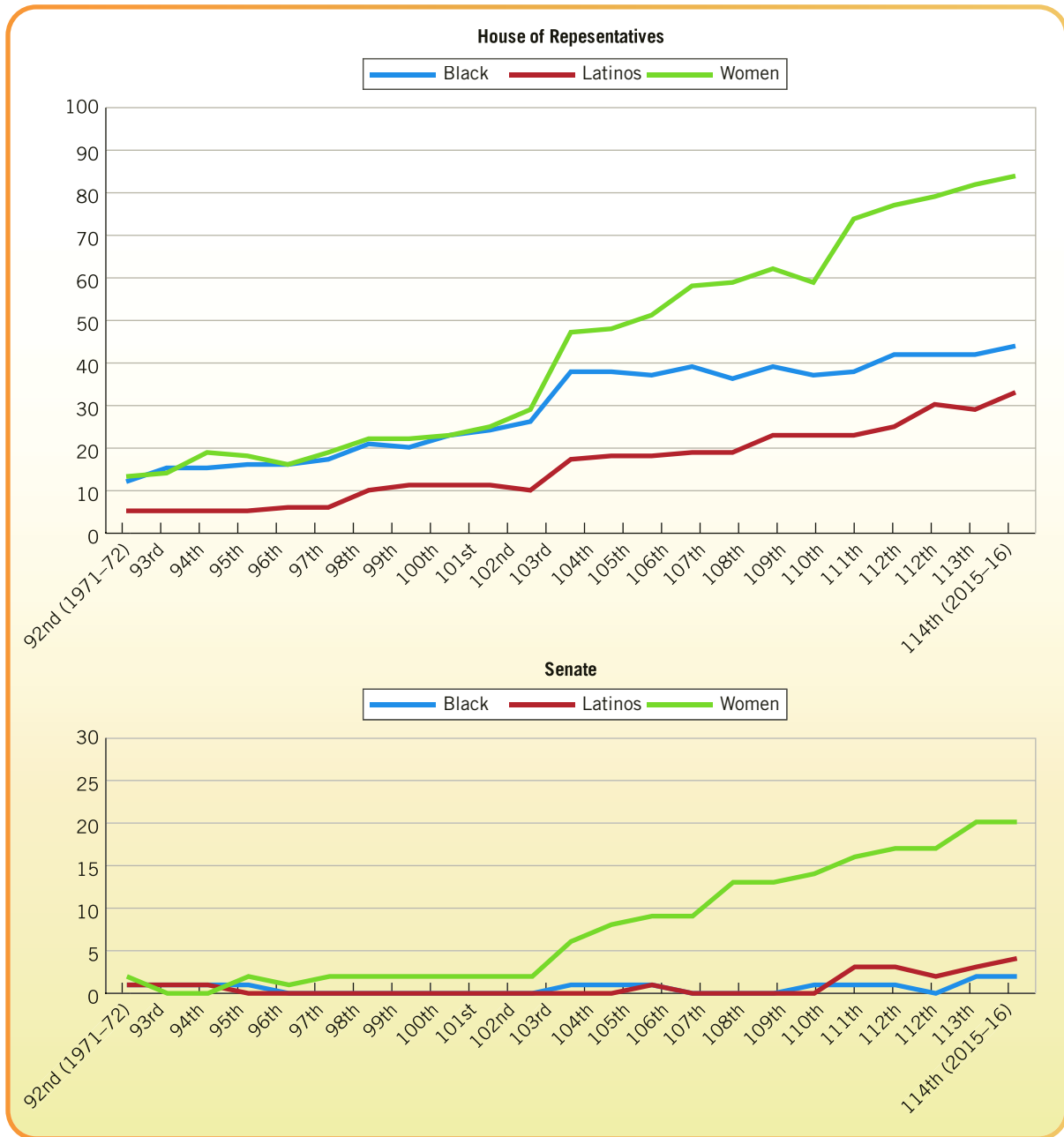
In the end then, which is preferable? Is it better to elect more racial and ethnic minorities to Congress, even if it means also passing fewer policies supported by racial and ethnic minorities? Or instead should we aim to elect fewer racial and ethnic minorities to Congress, but disperse minority voters across more districts to elect members who (on average) are more supportive of policies favored by minorities? The answer is unclear, and depends on how one views the relative importance of descriptive and substantive representation.

However one feels about descriptive vs. substantive representation, majority-minority districts have increased the power of African American and Latino members in another way. Because such districts typically are quite safe, their members often become senior leaders in Congress, especially on committees. For example, in 1994, African Americans chaired four House committees and Latinos chaired three. When the Democrats retook control of Congress in 2007, African Americans chaired five committees and Latinos chaired two more. Some of the committee chairpersons—such as Charles Rangel and John Conyers—have become very powerful members of Congress.

Similarly, the first woman to become Speaker (Nancy Pelosi in 2007) was a Democrat, and the post-1970 increase of women in Congress has been led by Democrats: in the 114th Congress that began in 2015, 14 of the 20 women in the Senate, and 62 of the 84 women in the House, were Democrats (plus three delegates).

Middle-aged white males with law degrees are still prevalent in Congress. But as Table 9-3 shows, compared to the 102nd Congress that began in 1991, the 114th Congress that began in 2015 had not only more women, blacks, and Latinos, but also fewer lawyers, fewer persons who had served in the armed forces, more businesspeople, more people over the age of 55, and more members (about one in six overall) serving their first term.



**FIGURE 9-1** Blacks, Hispanics, and Women in Congress, 1971–2015

Source: Congressional Quarterly, various years.

## Incumbency

In the 19th century, a large fraction—often a majority—of congressmen served only one term. In 1869, for example, more than half the members of the House were serving their first term in Congress. Being a congressman in those days was not regarded as a career. This was in part because the federal government was not very important (most of the interesting political decisions were made by the states); in part because travel to Washington, D.C., was difficult and the city was not a pleasant place in which to live; and in part because being a congressman did not pay well. Furthermore, many

congressional districts were highly competitive, with the two political parties fairly evenly balanced in each.

By the 1950s, however, serving in Congress had become a career. Between 1863 and 1969, the proportion of first-termers in the House fell from 58 percent to 8 percent.<sup>15</sup> As the public took note of this shift, people began to complain about “professional politicians” being “out of touch with the people.” A movement to impose term limits was started. In 1995, the House approved a constitutional amendment to do just that, but it died in the Senate. Then the Supreme Court struck down an effort by a state to impose term limits on its own members of Congress.

**marginal districts**  
Political districts in which candidates elected to the House of Representatives win in close elections, typically by less than 55 percent of the vote.

**safe districts**  
Districts in which incumbents win by margins of 55 percent or more.

in November 2014. In the 114th Congress (2015–2017), nearly half of members were first elected in 2010 or later, marking a change from just a few decades ago.<sup>16</sup>

But these periodic power-shifts that accompanied the arrival of scores of new faces in Congress should not obscure an important fact, documented decades ago by political scientists and still true today: Even in elections that result in the out party regaining power, most incumbent House members who seek reelection not only win, but win big, in their districts.<sup>17</sup> And while senators have been somewhat less secure than House members, most Senate incumbents seeking reelection have won it by a comfortable margin.

Figure 9-2 shows the 1964–2014 reelection rates for incumbent House and Senate members who sought reelection. Over that span of more than two dozen elections, the average reelection rate for House incumbents was 93 percent and for Senate incumbents, 82 percent. As Figure 9-2 demonstrates, reelection rates have been consistently high throughout this period. Even in years characterized by an anti-incumbent mood, the vast majority of House and Senate

In more recent years, political forces did what legislation could not—they brought new faces to the capital. In 1994, Republicans retook the House majority from the Democrats, who had held it since 1952. In so doing, they brought many new members to power who had not previously held elected office. Recent elections have continued this pattern. The November 2012 elections brought 75 first-term members to the House, and 58 new House members won election

TABLE 9-3 Who’s in Congress, 1991–1992 versus 2015–2016

	102nd Congress (1991–1992)	114th Congress (2015–2016)
<b>Average Age</b>		
House	53	57
Senate	57	61
<b>Occupation</b>		
Law	244	202
Business	189	273
<b>Military</b>		
Had served	277	101
<b>Incumbency</b>		
In first term	44	72

**Source:** 102nd Congress data adapted from chart based on Congressional Research Service and Military Officers Association data in John Harwood, “For New Congress, Data Shows Why Polarization Abounds,” *The New York Times*, March 6, 2011. 114th Congress data from Congressional Research Service, “Membership of the 114th Congress: A Profile,” March 31, 2015.

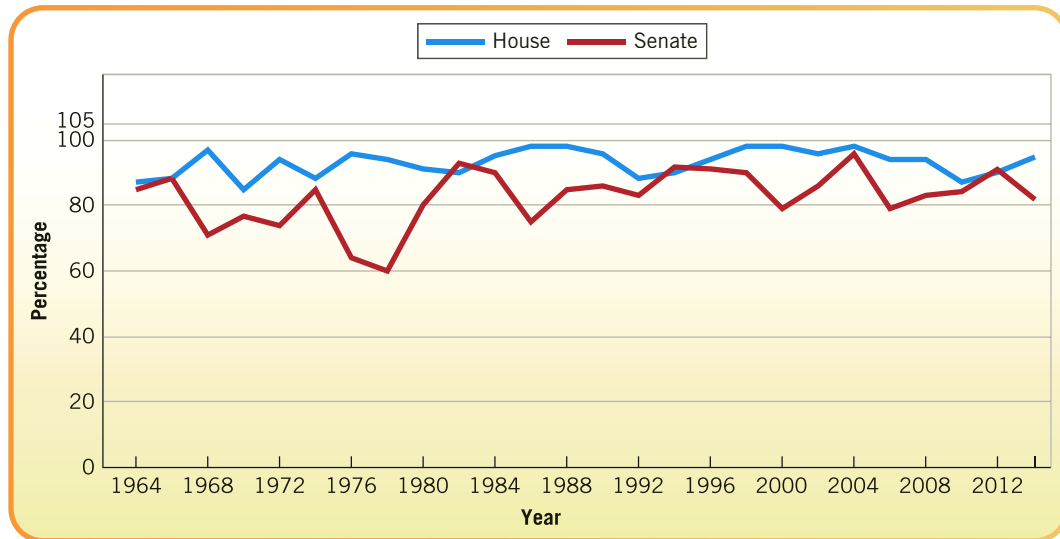
incumbents typically are reelected. In 2014, the largest-ever number voters told pollsters that their own member did not deserve reelection (35 percent), which many took to mean a deeply dissatisfied electorate would vote members out of office.<sup>18</sup> While some highly notable incumbents were defeated, such as Senator Kay Hagan in North Carolina, 95 percent of House members who sought reelection won, as did more than 80 percent of Senators. Year in and year out, most members of Congress are reelected.

House incumbents who seek reelection normally beat their opponents by at least several percentage points. Political scientists call districts with close elections (when the winner gets less than 55 percent of the vote) **marginal districts** and districts where incumbents win by wide margins (55 percent or more) **safe districts**. By this standard, in the 2012 election only 18 percent of House seats were marginal.<sup>19</sup> But perhaps we should use a stricter definition of safety: winning with 60 percent or more of the vote. Even here, the majority of incumbents would be considered safe. Since the 1970s, more than 60 percent of House members—in some years as high as 80 percent—have been re-elected with at least 60 percent of the major-party vote.<sup>20</sup> By contrast, over the same period, under half of all Senate incumbents who won reelection did so by such a wide margin. Safe states are far less common than safe districts.

Why congressional seats have become less marginal—that is, safer—is not entirely clear, and a number of factors have been proposed. Some of the most prominent focus on the resources of incumbents. Incumbents, as we explained in Chapters 7 and 8, have a large fundraising advantage over challengers. Further, incumbents simply are much better known than challengers, so they have a built-in advantage in terms of name recognition. Incumbents also do much to deluge the voter with free mailings, they can travel frequently



**IMAGE 9-3** Senator Tim Scott (R-SC) is one of two African-Americans currently serving in the Senate. He is the first African-American to be elected to both the House and the Senate.

**FIGURE 9-2** Reelection Rates for House and Senate Incumbents, 1964–2014

**Source:** Center for Responsive Politics, “Reelection Rates Over the Years,” <https://www.opensecrets.org/bigpicture/reelect.php>

(and at public expense) to meet constituents, and they can get their names in the headlines by sponsoring bills or conducting investigations. Simply having a familiar name is important in getting elected, and incumbents find it easier than challengers to make their names known.

Further, incumbents can use their power to get programs passed or funds spent to benefit their districts—and thereby to benefit themselves.<sup>21</sup> They can help keep an army base open, support the building of a new highway (or block the building of an unpopular one), take credit for federal grants to local schools and hospitals, make certain a particular industry or labor union is protected by tariffs against foreign competition, and so on.

They also can provide individual services to their constituents, helping them locate a lost Social Security check or provide help with a federal agency, such as the IRS or the Department of Veterans Affairs. If a member helps out a voter in this way, then that voter is more likely to support the member in his or her next election.<sup>22</sup>

Finally, incumbents have learned over time to behave as if they are at risk even when they are not.<sup>23</sup> No one thought Eric Cantor, then House Majority Leader, would lose his primary to a virtually unknown economics professor in 2014, but he did. While losses like Cantor’s are relatively rare, close elections are not; many members have had an uncomfortably narrow election win, or they know someone who has. These sorts of unexpected losses and near-losses lead members always to be wary, and to act as if they are not safe, even if they are. So members work hard to raise money, increase their name recognition, and provide services to their constituents, which increases their safety.

Probably all of these factors make some difference, and help to explain why districts are so safe today. This has two important implications. First, as we discussed in Chapter 8, there is an incumbency advantage, whereby incumbents do

better than challengers (for all of the reasons we discussed above). Second, this incumbent advantage means that in ordinary times, no one should expect any dramatic changes in the composition of Congress. Even when elections effect a change in party control in one or both chambers, even when new leaders are in charge and new members abound, many old hands will still be on hand in Congress.

## Party

Forty-two Congresses convened between 1933 and 2015 (a new Congress convenes every two years). The Democrats controlled both houses in 27 of these Congresses and at least one house in 31 of them, and they controlled the House continuously from 1952 to 1994. Few scholars predicted the 1994 Republican victory, and many at the time thought that Democrats would control the House well into the future. Since 1994, Republicans have been in power more often than Democrats; Democrats controlled the House from 2006–2010, but otherwise the House has been in Republican hands. What explains these patterns of control? In particular, why did Democrats control the House for so long, and why has the House become more competitive in recent years?

A key part of the reason that the Democrats controlled the House for so long is that the Democratic Party, throughout much of the 20<sup>th</sup> century, was really two separate parties operating under a common name—a more liberal Northern wing and a more conservative Southern wing. While they did not agree on many policies, they did share a common party label, and hence formed a large partisan bloc, which enabled them to be the majority party in the House for many decades.

While Northern and Southern Democrats aligned to maintain majority control of the chamber (and with it, control of congressional committees and the legislative process),



**conservative coalition** An alliance between Republicans and conservative Democrats.

typically they parted ways when it came to policy. Southern Democrats often would vote with the Republicans in the House or Senate, thereby forming what came to be called the **conservative coalition**.

During the 1960s and 1970s, that coalition came together in about one-fifth of all roll-call votes. When it did, it usually won, defeating Northern Democrats. But since the 1980s, and especially since the watershed election of 1994, the conservative coalition has become much less important. The reason is simple; many Southern Democrats in Congress have been replaced by Southern Republicans, and the Southern Democrats who remain (many of them African Americans) are as liberal as Northern Democrats. This change was an important contributor to the growing polarization we observe in Congress today.

But this factor alone does not explain why the Democrats controlled the House for so long, or why the process is now more competitive. One popular theory among the public, though not really among scholars, is that gerrymandering is to blame. As we discussed in Chapter 8, gerrymandering is the process of drawing districts to favor one party or the other. Those who favor this explanation suggest that when Democrats are in power, they tend to draw districts favoring Democrats and vice-versa when Republicans are in power. As we discussed in Chapter 8, gerrymandering does influence congressional elections, and it has contributed to electoral safety. But its effect is modest rather than massive. Several studies of recent elections, such as 2006 and 2012, note that redistricting affected the outcome, but only to a modest degree.<sup>24</sup>

Further, there are several practical limits to gerrymandering's effects as well. First, drawing Congressional districts is the duty of the states, most typically of the state legislature (though some states use some sort of commission). So for one party to really stack the deck in its favor, it needs to control the state legislature of many states, which is difficult to do. Many commissions are non-partisan, or have input from the governor. Because of the political sensitivity regarding congressional districts, many district boundaries are decided ultimately by the courts, which adds another layer of complexity to the process. Many different factors contribute to drawing congressional boundaries, making it hard for one party to really gain an advantage solely due to redistricting.

The effects of gerrymandering are also constrained by relevant state and federal laws. Federal law requires that districts have equal population, and the courts have interpreted this rather strictly, rejecting even modest deviations in population across congressional districts.<sup>25</sup> Further, as we discussed above, the Voting Rights Act established majority-minority districts, which requires many states to have districts composed predominantly of racial/ethnic minorities. Many states also have relevant state laws that require districts to be contiguous and geographically compact, and to respect political boundaries and communities of interest. Even when legislators want to engage in gerrymandering, their ability to do so is constrained by other factors. Even if there were

no gerrymandering, many members of Congress would be reelected easily to Congress.

## Representation and Polarization

In a decentralized, individualistic institution such as Congress, it is not obvious how its members will behave. They could be devoted to doing whatever their constituents want or—since most voters are not aware of what their representatives do—act in accordance with their own beliefs, the demands of pressure groups, or the expectations of congressional leaders. You may think it would be easy to figure out whether members are devoted to their constituents by analyzing how they vote, but that is not quite right. Members can influence legislation in many ways other than by voting; they can conduct hearings, help mark up bills in committee meetings, and offer amendments to the bills proposed by others. A member's final vote on a bill may conceal as much as it reveals; some members may vote for a bill that contains many things they dislike because it also contains a few things they value.

There are at least three theories about how members of Congress behave: representational, organizational, and attitudinal. The *representational* explanation is based on the reasonable assumption that members want to get reelected, and therefore vote to please their constituents. The *organizational* explanation is based on the equally reasonable assumption that since most constituents do not know how their legislator has voted, it is not essential to please them. But it is important to please fellow members of Congress, whose goodwill is valuable in getting things done and in acquiring status and power in Congress. The *attitudinal* explanation is based on the assumption that there are so many conflicting pressures on members of Congress that they cancel one another out, leaving them virtually free to vote on the basis of their own beliefs. Political scientists have studied, tested, and argued about these (and other) explanations for decades, and nothing like a consensus has emerged. Some facts have been established, however, in regard to these three views.

### Representational View

The representational view has some merit under certain circumstances—namely, when constituents have a clear view on some issue and a legislator's vote on that issue is likely to attract their attention. Such is often the case for civil rights laws: representatives with significant numbers of black voters in their districts are not likely to oppose civil rights bills; representatives with few African Americans in their districts are comparatively free to oppose such bills. Until the late 1960s, many Southern representatives were able to oppose civil rights measures because the African Americans in their districts were prevented from voting. On the other hand, many representatives without black constituents have supported civil rights bills, partly out of personal belief and partly perhaps because certain white groups in their districts—organized liberals, for example—have insisted on such support.

From time to time, an issue arouses deep passions among the voters, and legislators cannot escape the need



**IMAGE 9-4** U.S. Representative Tulsi Gabbard is the first American Samoan, first Hindu, and one of the first female combat veterans to serve in Congress. She won election in 2012 from Hawaii.

either to vote as their constituents want regardless of their own personal views, or to anguish at length about which side of a divided constituency to support. Gun control has been one such question and the use of federal money to pay for abortions has been another. Some fortunate members of Congress get unambiguous cues from their constituents on these matters, and no hard decision is necessary. Others get conflicting views, and they know that whichever way they vote, it may cost them dearly in the next election. Occasionally, members of Congress in this fix will try to be out of town when the matter comes up for a vote.

You might think that members of Congress who won a close race in the last election—who come from a “marginal” district—would be especially eager to vote the way their constituents want. Research so far has shown that is not generally the case. There seem to be about as many independent-minded members of Congress from marginal as from safe districts.<sup>26</sup> Perhaps it is because opinion is so divided in a marginal seat that one cannot please everybody; as a result, the representative votes on other grounds.

The limit to the representative explanation is that public opinion is not strong and clear for most measures on which Congress must vote. Many representatives and senators face constituencies that are divided on key issues. Some constituents go to special pains to make their views known (these interest groups were discussed in Chapter 7). But as we indicated, the power of interest groups to affect congressional votes depends, among other things, on whether a legislator sees them as united and powerful or as disorganized and marginal.

But when public opinion is strong and clear, members do respond to it. A recent study illustrates this point nicely. The researchers gave some legislators—but not others—information about public opinion in their districts toward a proposed spending bill. Those who received the information were much more likely to support the position favored by their constituents.<sup>27</sup> This fits with broader studies that show that legislators

are highly attuned to public sentiment in their districts, and try to vote in ways that reflect their constituents’ views.<sup>28</sup>

Why does constituent opinion exert such a strong effect on member behavior? Because voting counter to the wishes of your constituents put members at grave risk of being voted out of office. If a member is repeatedly out of step with public opinion in his or her district, then challengers will leap on this pattern of votes in the next election. While most voters do not know how their member of Congress voted on various pieces of legislation, challengers will pounce upon and exploit votes taken by a member that many constituents would oppose. If a member is too liberal or conservative for their district, typically they will be defeated.<sup>29</sup> Indeed, even one vote that is against the constituency’s wishes can be fatal, especially if it is on a highly salient piece of legislation such as Obamacare.<sup>30</sup> Those members who vote against the district’s wishes typically find themselves out of a job.

## Organizational View

When voting on matters where constituency interests or opinions are not vitally at stake, members of Congress respond primarily to cues provided by their colleagues. This is the organizational explanation of their votes. The principal cue is party—no other factor explains as much of a member’s behavior in office. Even when a Democrat and a Republican represent the same district, with the exact same voters, they often will vote differently (note the parallel to the power of party in shaping voters’ views, as we discussed in Chapter 6).

But do not think that members adopt their party’s position blindly on the issues with little or no thought—far from it. Nor does the power of party simply reflect the power of party leaders to whip members into adopting the party line. While leaders do have some powers to reward and punish members,<sup>31</sup> those powers are relatively constrained.<sup>32</sup> Rather, the effect of party reflects different values of Democratic and Republican members. A member’s party reflects his or her beliefs about how the government should be run—in today’s Congress, those who want to see a more active role for government by and large are Democrats, and those who want to see the government do less typically are Republicans. Further, Democratic (Republican) members of Congress have similar constituencies to other Democratic (Republican) members, and they are supported by similar interest groups. It is the power of these other influences—the constituents, supporting interest groups, and political values—that lead Democrats and Republicans to vote differently in Congress.

Another influence, closely related to party, could be the view of an important ideological group within the House. There are a number of groups on both sides of the aisle that represent various points of view in the various ideological debates in Congress. On the left, there are groups such as the Democratic Study Group, and for conservatives, it often has been the Republican Study Committee or, in more recent years, the House Freedom Caucus.

But party and other organizations do not have clear positions on all matters. For the scores of votes that do not involve the “big questions,” a representative or senator is

**majority leader**

The legislative leader elected by party members holding the majority of seats in the House or the Senate.

**minority leader**

The legislative leader elected by party members holding a minority of seats in the House or the Senate.

especially likely to be influenced by the members of his or her party on the sponsoring committee.

It is easy to understand why. Suppose you are a Democratic representative from Michigan who is summoned to the floor of the House to vote on a bill to authorize a new weapons system. You may well not understand the bill in any detail, since you are not a member of the authorizing committee. There is no obvious liberal or conservative position on this

matter. How do you vote? Simple. You take your cue from several Democrats on the House Armed Services Committee that handled the bill. Some are liberal; others are more moderate. If both liberals and moderates support the bill, you vote for it unhesitatingly. If they disagree, you vote with whichever Democrat is generally closest to your own political ideology. If the matter is one that affects your state, you can take your cue from members of your state's delegation to Congress.

## Attitudinal View

Finally, a member's own ideology influences his or her behavior. This should hardly be surprising. As we saw in Chapter 6, political elites think more ideologically than the public. And as we saw above, it is a member's personal views—their ideology and values—that shape why party is such a powerful influence. But as we suggested at the start of this chapter, Congress has become an increasingly ideological organization—that is, its members are divided more sharply by political ideology than they once were. Today, all of Congress's most liberal members are Democrats, and all of its most conservative are Republicans.

Why attitudes have hardened along ideological and partisan lines in Congress is a topic of much scholarly debate. Many different factors have contributed to Congress becoming more polarized, and we lack the space to discuss all of them. We discussed a crucial factor above—conservative Southern Democrats gradually became conservative Southern Republicans over the second half of the 20<sup>th</sup> century. Another factor is that those who are the most involved in politics (the activists) tend to be those with the strongest views, as we discussed in Chapter 6. Most Americans, unlike members of Congress, remain relatively moderate and unideological. But among those who participate the most, there tends to be more division and ideological thinking.

This division in the electorate supports Congressional polarization. As we discussed in earlier chapters, members of Congress respond to those who participate. If those who vote, donate money, and volunteer for campaigns are more extreme, this influences the positions taken by members of Congress. Further, while most voters prefer compromise and bipartisanship, these activists do not, and they instead want

their members to stand firm for his or her ideological principles,<sup>33</sup> adding further fuel to the polarization fire.

This stands in stark contrast to most ordinary Americans, who are moderate, largely un-ideological, and like compromise and consensus. Unfortunately, most ordinary Americans are also not terribly interested politically, and are less likely to turnout and vote or to participate in politics in other ways. For example, one study found that, of political moderates, only about 20 percent are politically attentive, while the rest are largely disengaged from politics.<sup>34</sup> Given this, members of Congress tend to pay these voters less heed, unless someone organizes them to make their voice heard. While overall district sentiment matters (as we discussed above), those who vote become the most influential; politicians respond to those who make their voices heard.

This helps us to understand the puzzle from the beginning of the chapter. We see that congressional polarization reflects deep divisions in the public and a disconnect from ordinary Americans. The deep divisions are among political activists; the disconnect is from the rest of the electorate.<sup>35</sup> How this situation will change—if at all—in the years to come remains to be seen.

## 9-4 The Organization of Congress: Parties and Interests

Congress is not a single organization; it is a vast and complex collection of organizations by which the business of Congress is carried on and through which members of Congress form alliances. Unlike the British Parliament—in which the political parties are the only important kind of organization—parties are just one of many important units in Congress (though they are one of the most important organizational units in Congress).

### Party Organizations

The Democrats and Republicans in the House and the Senate are organized by party leaders, who in turn are elected by the full party membership within the House and Senate.

### The Senate

The majority party chooses one of its members—usually the person with the greatest seniority—to be president *pro tempore* of the Senate. This is usually an honorific position, required by the Constitution so that the Senate will have a presiding officer when the vice president of the United States (according to the Constitution, the president of the Senate) is absent. In fact, both the president *pro tem* and the vice president usually assign the tedious chore of presiding to a junior senator.

The real leadership is in the hands of the **majority leader** and **minority leader**. The principal task of the majority leader is to schedule the business of the Senate, usually in consultation with the minority leader. A majority leader who has a strong personality and is skilled at political bargaining (such as Lyndon Johnson, the Democrats' leader in the 1950s) may also acquire much influence over the substance of Senate business.



A **whip**, chosen by each party, helps party leaders stay informed about what the party members are thinking, rounds up members when important votes are taken, and attempts to keep a nose count of how voting on a controversial issue is likely to go. Several senators assist each party whip.

Each party also chooses a Policy Committee composed of a dozen or so senators who help the party leader schedule Senate business, choosing what bills will be given major attention and in what order.

For individual senators, however, the key party organization is the group that assigns senators to the Senate's standing committees: for the Democrats, a 22-member Steering and Outreach Committee; for the Republicans, an 18-member Committee on Committees. For newly elected senators, their political careers, opportunities for favorable publicity, and chances for helping their states and constituents depend in great part on the committees to which they are assigned. Achieving ideological and regional balance is a crucial—and delicate—aspect of selecting party leaders, making up important committees, and assigning freshmen senators to committees.

## The House of Representatives

The party structure essentially is the same in the House as in the Senate, though the titles of various posts are different. But leadership carries more power in the House than in the Senate because of the House rules. Being so large (435 members), the House must restrict debate and schedule its business with great care; thus leaders who manage scheduling and determine how the rules shall be applied usually have substantial influence.

The **Speaker**, who presides over the House, is the most important person in that body and is elected by whichever party has a majority. Unlike the president *pro tem* of the Senate, this position is anything but honorific, for the Speaker is also the principal leader of the majority party. Though Speakers as presiders are expected to be fair, Speakers as party leaders are expected to use their powers to help pass legislation favored by their party.

In helping his or her party, the Speaker has some important formal powers. He or she decides who shall be recognized to speak on the floor of the House, rules whether a motion is relevant and germane to the business at hand, and decides (subject to certain rules) the committees to which new bills shall be assigned. He or she influences what bills are brought up for a vote and appoints the members of special and select committees. Since 1975, the Speaker has been able to select the majority-party members of the Rules Committee, which plays an important role in the consideration of bills. The Speaker also has some informal powers. He or she controls some patronage jobs in the Capitol building and the assignment of extra office space. Though now far less powerful than some of his or her predecessors, the Speaker is still an important person to have on one's side.

In the House, as in the Senate, the majority party elects a floor leader, called the *majority leader*. The other party chooses the minority leader. Traditionally, the majority leader becomes Speaker when the person in that position dies or retires—provided, of course, that his or her party is still in the

majority. Each party also has a whip, with several assistant whips in charge of rounding up votes. For the Democrats, committee assignments are made and the scheduling of legislation is discussed in a Steering and Policy Committee chaired by the Speaker (or minority leader, depending on which party is in the majority). The Republicans have divided responsibility for committee assignments and policy discussion between two committees. Each party also has a congressional campaign committee to provide funds and other assistance to party members running for election or reelection to the House.

## Party Voting

The effect of this elaborate party machinery can be measured crudely by the extent to which party members vote together in the House and the Senate. A **party vote** can be defined in various ways; naturally, the more stringent the definition, the less party voting we will observe.

Figure 9-3 shows party voting in the House of Representatives in the last sixty years. The typical measure counts as a party vote one in which at least 50 percent of the Democrats vote together against 50 percent of the Republicans; this is the definition we use in Figure 9-3 (though some insist on a stricter definition, say finding that 90 percent of Democrats vote against 90 percent of Republicans). Figure 9-3 shows a striking trend; since the 1970s, there have been more and more party unity votes as a fraction of all votes cast. That is, more and more votes (today, nearly 7 in 10 votes) are party unity votes.

Given that political parties as organizations do not tightly control a legislator's ability to get elected, this high level of party voting is surprising. There are several reasons that congressional members of one party sometimes do vote together against a majority of the other party. First, members of Congress do not decide randomly to be Democrats or Republicans; at least for most members, these choices reflect some broad policy agreements. By tabulating the ratings that several interest groups give members of Congress for voting on important issues, it is possible to rank each member of Congress from most to least liberal in many policy areas, including economic affairs, social questions, and foreign and military affairs. Democrats in the House and Senate are much more liberal than Republicans across nearly all issues. This has been true for many years, and as we discussed

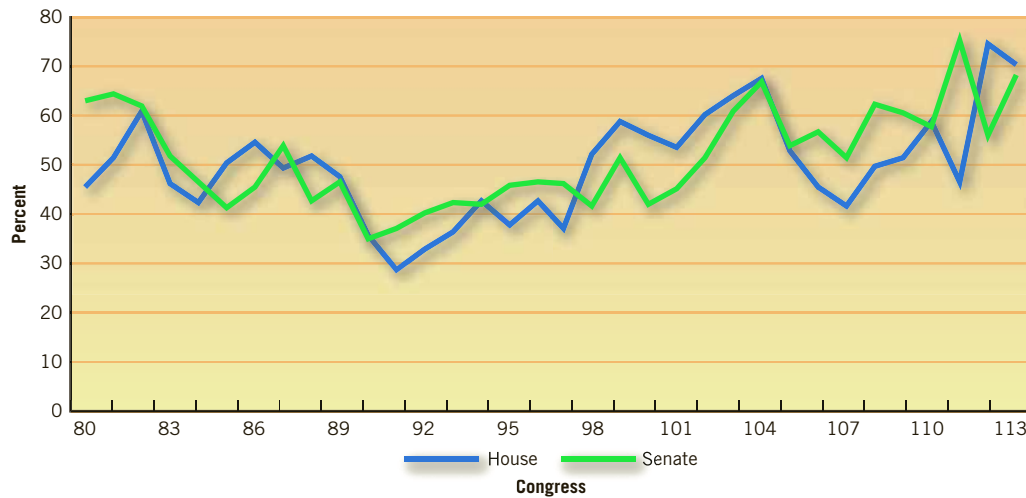
**whip** A senator or representative who helps the party leader stay informed about what party members are thinking.

**Speaker** The presiding officer of the House of Representatives and the leader of his or her party in the House.

**party vote** There are two measures of such voting. By the stricter measure, a party vote occurs when 90 percent or more of the Democrats in either house of Congress vote together against 90 percent or more of the Republicans. A looser measure counts as a party vote in any case where at least 50 percent of the Democrats vote together against at least 50 percent of the Republicans.

**FIGURE 9-3** Party Unity Votes in House and Senate, 80th – 113th Congresses (1947–2014)

Percentage of votes in which a majority of voting Democrats opposed a majority of voting Republicans.



**Source:** Keith Poole and Howard Rosenthal, Party Unity Scores, [voteview.com](http://voteview.com), Accessed January 2016.

**caucus** An association of congressional members created to advance a political ideology or a regional, ethnic, or economic interest.

elsewhere in the chapter, the gap between Democrats and Republicans on the issues has been increasing.

In addition to their personal views, members of Congress have other reasons for supporting their party's position at least some of the time. On

many matters that come up for vote, members of Congress often have little information and no opinions. It is only natural that they look to fellow party members for advice. Furthermore, supporting the party position can work to the long-term advantage of a member interested in gaining status and influence in Congress. Though party leaders are weaker today than in the past, they are hardly powerless. Sam Rayburn reputedly told freshman members of Congress that "if you want to get along, go along." That is less true today, but still good advice.

In short, party *does* make a difference—though not as much as it did at the turn of the 20th century, and not as much as it does in a parliamentary system. Party affiliation is still the single most important thing to know about a member of Congress. Because party affiliation in the House today embodies strong ideological preferences, the mood of the House is often testy and strident. Members no longer get along with each other as well as they did 40 years ago. Many liberals and conservatives dislike each other intensely, despite their routine use of complimentary phrases.

## Caucuses

Congressional caucuses are another set of important organizations in Congress. A **caucus** is an association of members of Congress created to advocate a political ideology or

to advance a regional, ethnic, or economic interest. In 1959, only four such caucuses existed; by the early 1980s, there were more than 70. The more important among them have included the Democratic Study Group (uniting more than 200 liberal Democrats, though their names are not publicized to avoid embarrassing them with constituents), the Coalition (more popularly known as the Blue Dog Democrats), a group of moderate-to-conservative Democrats, and the Tuesday Group (formerly known as the Tuesday Lunch Bunch). Other caucuses include the delegations from certain large states who meet on matters of common interest, as well as the countless groups dedicated to racial, ethnic, regional, and policy interests. The Congressional Black Caucus in the House is one of the best known of these and is probably typical of many in its operations. It meets regularly and employs a staff. As with most other caucuses, some members are very active, others only marginally so. On some issues it simply registers an opinion; on others, it attempts to negotiate with leaders of other blocs so that votes can be traded in a mutually advantageous way. It keeps its members informed and on occasion presses to put a member on a regular congressional committee that has no blacks. In 1995, the House Republican majority decided to eliminate government funding of caucuses, forcing some to shrivel and others to seek outside support.

## The Organization of Congress: Committees

The most important organizational feature of Congress beyond the parties is the set of legislative committees of the House and Senate. In the chairmanship of these committees, and their subcommittees, most of the power of Congress is found. The number and jurisdiction of these committees are of the greatest interest to members of Congress; decisions

on these subjects determine what groups of legislators with what political views will pass on legislative proposals, oversee the workings of agencies in the executive branch, and conduct investigations. A typical Congress has, in each house, about two dozen committees and well over 100 subcommittees.

Periodically, efforts have been made to cut the number of committees to give each a broader jurisdiction and to reduce conflict between committees over a single bill. But as the number of committees declined, the number of subcommittees rose, leaving matters much as they had been.

There are three kinds of committees: **standing committees** (more or less permanent bodies with specific legislative responsibilities), **select committees** (groups appointed for a limited purpose, which do not introduce legislation and which exist for only a few years), and **joint committees** (on which both representatives and senators serve). An especially important kind of joint committee is the **conference committee**, made up of representatives and senators appointed to resolve differences in the Senate and House versions of a bill before final passage. Though members of the majority party could in theory occupy all the seats on all the committees, in practice they take the majority of the seats, name the chairperson, and allow the minority party to have the remainder of the seats. The number of seats varies from about six to more than 50.

Usually the ratio of Democrats to Republicans on a committee roughly corresponds to their ratio in the House or Senate. Standing committees are more important because, with a few exceptions, they are the only committees that can propose legislation by reporting a bill out to the full House or Senate. Each member of the House usually serves on two standing committees, but members of certain committees—Appropriations, Rules, Ways and Means, Energy and Commerce, or Financial Services—are limited to serving on one. Each senator may serve on two major committees and one minor committee, but this rule is not enforced strictly. Table 9-4 below lists the standing committees in each chamber.

In the past, when party leaders were stronger, committee chairs were picked on the basis of loyalty to the leader. When this leadership weakened, seniority on the committee came to govern the selection of chairpersons. While the seniority system still largely governs which members become committee chairs, seniority is no longer sacrosanct. In 1971, House Democrats decided in their caucus to elect committee chairs by secret ballot; four years later, they used that procedure to remove three committee chairs who held their positions by seniority. Between 1971 and 1992, the Democrats replaced a total of seven senior Democrats with more junior ones as committee chairs. When Republicans took control of the House in 1995, Speaker Newt Gingrich ignored seniority in selecting several committee chairs, picking instead members who he felt would do a better job. In this and other ways, Gingrich enhanced the Speaker's power to a degree not seen since 1910.

Throughout most of the 20th century, committee chairs dominated the work of Congress. In the early 1970s, their power came under attack—mostly from liberal Democrats upset at the opposition to civil rights legislation by

conservative Southern Democratic chairs. The liberals succeeded in getting the House to adopt rules that weakened the chairs and empowered individual members. Among the changes were these:

- Committee chairs must be elected by the majority party, voting by secret ballot.
- The ability of committee chairs to block legislation by refusing to refer it to a subcommittee for a hearing is banned.
- All committees and subcommittees must hold public meetings unless the committee has voted to close them.
- Subcommittee chairs must be elected by committee members.
- Subcommittee chairs can hire their own staffs, independent of the committee chair.

The effect of these and other changes was to give individual members more power and committee chairs less. When the Republicans took control of the House in 1995, they made more changes, including the following:

- They reduced the number of committees and subcommittees.
- They authorized committee chairs to hire subcommittee staffs.
- They imposed term limits on committee and subcommittee chairs of three consecutive terms (or six years) and on the Speaker of four consecutive terms (or eight years).
- They prohibited chairs from casting an absent committee member's vote by proxy.

The House Republican rules gave back some power to chairpersons (e.g., by letting them pick all staff members) but reduced it further in other ways (e.g., by imposing term limits and banning proxy voting). The commitment to public meetings remained.

In the Senate there have been fewer changes, in part because individual members of the Senate always have had more power than their counterparts in the House. There were, however, three important changes made by the Republicans in 1995:

- A six-year term limit was set on all committee chairs (but not on the term of majority leader).
- Committee members were required to select their chairs by secret ballot.

#### **standing committees**

Permanently established legislative committees that consider and are responsible for legislation within a certain subject area.

#### **select committees**

Congressional committees appointed for a limited time and purpose.

#### **joint committees**

Committees on which both senators and representatives serve.

#### **conference committee**

Joint committees appointed to resolve differences in the Senate and House versions of the same bill.



**TABLE 9-4** Standing Committees of the House & Senate

House	Senate
<b>Exclusive Committees:</b> <i>Members may not serve on any other committee, except for Budget.</i>	<b>Major Committees:</b> <i>No Senator serves on more than two, though this rule may be ignored:</i>
Appropriations	Agriculture, Nutrition, and Forestry
Rules	Appropriations
Ways & Means	Armed Services
Energy and Commerce*	Banking, Housing, and Urban Affairs
Financial Services**	Budget
<b>Major Committees:</b> <i>Members may serve on only one major committee.</i>	Commerce, Science, and Transportation
Agriculture	Energy and Natural Resources
Armed Services	Environment and Public Works
Education and Labor	Finance
Foreign Affairs	Foreign Relations
Homeland Security	Health, Education, Labor, and Pensions
Judiciary	Homeland Security and Governmental Affairs
Transportation and Infrastructure	Judiciary
<b>Nonmajor Committees:</b> <i>Members may serve on one major and two nonmajor committees:</i>	<b>Minor Committees:</b> <i>No Senator is supposed to serve on more than one:</i>
Budget	Rules and Administration
House Administration	Small Business and Entrepreneurship
Natural Resources	Veterans' Affairs
Oversight and Government Reform	<b>Select Committees:</b>
Science and Technology	Aging
Small Business	Indian Affairs
Standards & Official Conduct (Ethics)	Intelligence
Veterans' Affairs	Ethics
<b>Select Committees:</b>	<b>Joint Committees:</b>
Intelligence	Printing
Benghazi	Taxation
	Library
	Economic

\* = For Democrats, the Energy and Commerce Committee is an exclusive committee for those who first served on the committee in the 104<sup>th</sup> House or later.

\*\* = For Democrats, the Financial Services Committee is an exclusive committee for those who first served on the committee in the 109<sup>th</sup> Congress or later.

- Beginning in 1997, the chairs of Senate committees were limited to one six-year term.

Despite these new rules, the committees remain the place where the real work of Congress is done. These committees tend to attract different kinds of members. Some—such as the committees that draft tax legislation (the Senate Finance Committee and the House Ways and Means Committee) or that oversee foreign affairs (the Senate and House Foreign Relations Committees)—have been attractive to members who want to shape public policy, become experts on important issues, and have influence with their

colleagues. Others, such as the House and Senate committees dealing with public lands, small business, and veterans' affairs, are attractive to members who want to serve particular constituency groups.<sup>36</sup> For example, a member from an district with a great deal of agricultural land might want to serve on the House Committee on Agriculture, or a member with a large military base might want to serve on the House Armed Services Committee. Doing so will enable those members to gain expertise on policy areas relevant to his or her district, and to provide benefits to his or her constituents. Such knowledge and benefits in turn further a member's reelection chances.<sup>37</sup> Indeed, many members

choose to serve on committees that are relevant to their districts' economic interests.

## The Organization of Congress: Staffs and Specialized Offices

In 1900, representatives had no personal staff, and senators averaged fewer than one staff member each. By 1979, the average representative had 16 assistants and the average senator had 36. Since then the numbers have remained about the same. To the more than 10,000 people on the personal staffs of members of Congress must be added another 3,000 who work for congressional committees, and yet another 3,000 employed by various congressional research agencies. Congress has produced the most rapidly growing bureaucracy in Washington; the personal staffs of legislators have increased more than fivefold since 1947.<sup>38</sup> Though many staffers perform routine chores, many others help draft legislation, handle constituents, and otherwise shape policy and politics.

### Tasks of Staff Members

A major function of a legislator's staff is to help constituents solve problems and thereby help that member of Congress get reelected. Indeed, over the last two decades, a growing proportion of congressional staffs have worked in the local (district or state) offices of the legislator rather than in Washington. Almost all members of Congress have at least one such home office, and most have two or more. As we discussed earlier in the chapter, this sort of constituency service helps to explain why incumbents are so difficult to defeat.

The legislative function of congressional staff members is also important. With each senator serving on an average of more than two committees and seven subcommittees, it is virtually impossible for members of Congress to become familiar with the details of all the proposals that come before

them or to write all the bills that they feel ought to be introduced.<sup>39</sup> The role of staff members has expanded in proportion to the tremendous growth in Congress's workload.

The orientation of committee staff members differs. Some think of themselves as politically neutral professionals—and to a substantial degree they are—whose job it is to assist members of a committee, whether Democrats or Republicans, in holding hearings or revising bills. Others see themselves as partisan advocates, interested in promoting Democratic or Republican causes, depending on who hired them.

Those who work for individual members of Congress, as opposed to committees, see themselves entirely as advocates for their bosses. They often assume an entrepreneurial function, taking the initiative in finding and selling a policy to their boss—a representative or senator—who can take credit for it. Lobbyists and reporters understand this completely and therefore spend a lot of time cultivating congressional staffers.

The increased reliance on staff has changed Congress, mainly because the staff has altered the environment within which Congress does its work. In addition to their role as entrepreneurs promoting new policies, staffers act as negotiators: Members of Congress today are more likely to deal with one another through staff intermediaries than through personal contact. Congress thereby has become less collegial, more individualistic, and less of a deliberative body.<sup>40</sup>

### Staff Agencies

In addition to increasing the number of staff members, Congress also has created a set of staff agencies that work for Congress as a whole. These have come into being in large part to give Congress specialized knowledge, equivalent to what the president has by virtue of his or her position as chief of the executive branch. One of these, the *Congressional Research Service (CRS)*, is part of the Library of Congress and employs almost 900 people; it is politically neutral, responding to requests by members of Congress for information and giving both sides of arguments. The *Government Accountability Office (GAO)*, once merely an auditing agency, now has about 5,000 employees. It investigates policies and makes recommendations on almost every aspect of government; its head, though appointed by the president for a 15-year term, is very much the servant of Congress rather than the president. The *Congressional Budget Office (CBO)*, created in 1974, advises Congress on the likely impact of different spending programs and attempts to estimate future economic trends.



Mark Wilson/Getty Images

**IMAGE 9-5** Secretary of State John Kerry, Secretary of Defense Ashton Carter, and Chairman of the Joint Chiefs of Staff Martin Dempsey testify before the Senate Foreign Relations Committee about the Obama administration's request for Congress to authorize the use of force against terrorist groups.

## 9-5 How a Bill Becomes Law

Some bills zip through Congress; others make their way painfully and slowly, sometimes emerging in a form very different from their original one. Congress is like a crowd, moving sluggishly or, when excited, with great speed. While reading the following account of how a bill becomes law (see Figure 9-4), keep in mind that the complexity of congressional procedures ordinarily gives powerful advantages to the opponents of any new policy. There are many points at which action can be blocked. This does not mean that nothing gets done—but

**simple resolution** An expression of opinion either in the House or Senate to settle procedural matters in either body.

**concurrent resolution** An expression of opinion without the force of law that requires the approval of both the House and the Senate, but not the president.

that to get something done, a member of Congress must *either* slowly and painstakingly assemble a majority coalition or take advantage of enthusiasm for some new cause that sweeps away the normal obstacles to change.

### Introducing a Bill

Any member of Congress may introduce a bill: in the House, by handing it to a clerk or dropping it in a box; in the Senate, by being recognized by the presiding officer and announcing

the bill's introduction. Bills are then numbered and printed. If a bill is not passed within one session of Congress, it is dead and must be reintroduced during the next Congress.

We often hear that legislation is initiated by the president and enacted by Congress. The reality is more complicated. Congress often initiates legislation (e.g., most consumer and environmental laws passed since 1966 originated in Congress), and even laws proposed formally

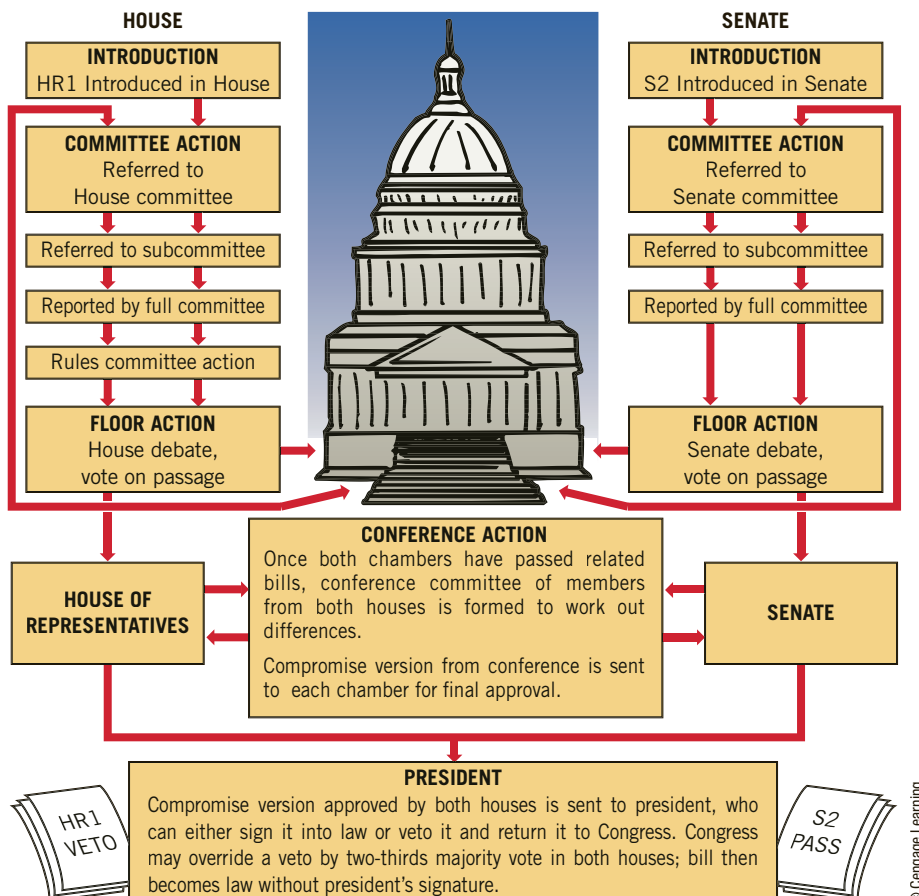
by the president often have been incubated in Congress. Even when he is the principal author of a bill, a president usually submits it (if he is prudent) only after careful consultation with key congressional leaders. In any case, he cannot himself introduce legislation; he must get a member of Congress to do it for him.

In addition to bills, Congress can also pass resolutions. Either house can use a **simple resolution** for such matters as establishing operating rules. A **concurrent resolution** is used to settle housekeeping and procedural matters that affect both houses. Simple and concurrent resolutions are not signed by the president and do not have the force of law. A **joint resolution** requires approval by both houses and a presidential signature; it is essentially the same as a law. A joint resolution is also used to propose a constitutional amendment, in which case it must be approved by a two-thirds vote in each house, but does not require the signature of the president.

### Study by Committees

A bill is referred to a committee for consideration by either the Speaker of the House or the Senate's presiding officer. If a chairperson or committee is known to be hostile to a bill, assignment can be a crucial matter. Rules govern which

**FIGURE 9-4** How a Bill Becomes Law





committee will get which bill, but sometimes a choice is possible. In the House, the Speaker's right to make such a choice (subject to appeal to the full House) is an important source of his or her power.

The Constitution requires that "all bills for raising revenue shall originate in the House of Representatives." The Senate can and does amend such bills, but only after the House has acted first. Bills that are not for raising revenue—that is, that do not alter tax laws—can originate in either chamber. In practice, the House also originates *appropriations bills* (bills that direct the spending of money). Because of the House's special position on revenue legislation, the committee that handles tax bills—the Ways and Means Committee—is particularly powerful.

Most bills die in committee. They are often introduced only to get publicity for various members of Congress, or to enable them to say to a constituent or pressure group that they "did something" on some matter. Bills of general interest—many of them drafted in the executive branch, though introduced by members of Congress—are assigned to a subcommittee for a hearing where witnesses appear, evidence is taken, and questions are asked. These hearings are used to inform members of Congress, to permit interest groups to speak out (whether or not they have anything helpful to say), and to build public support for a measure favored by the majority on the committee.

Though committee hearings are necessary and valuable, they also fragment the process of considering bills dealing with complex matters. Both power and information are dispersed in Congress, and thus it is difficult to take a comprehensive view of matters cutting across committee boundaries. This has made it harder to pass complex legislation. For example, President George W. Bush's proposals to expand government support for religious groups that supply social services were dissected into small sections for consideration by the various committees that had jurisdiction; after three years, no laws emerged. But strong White House leadership and supportive public opinion can push through controversial measures without great delay, as in the cases of Bush's tax cuts in 2001 and homeland security plans in 2002.

After the hearings, the committee or subcommittee makes revisions and additions (sometimes extensive) to the bill, but these changes do not become part of the bill unless they are approved by the entire house. If a majority of the committee votes to report a bill favorably to the House or Senate, it goes forward, accompanied by an explanation of why the committee favors it and why it wishes to see its amendments, if any, added. Committee members who oppose the bill may include their dissenting opinions.

If the committee does not report the bill out to the house favorably, that ordinarily kills it, though there are complex procedures whereby the full House can get a bill that is stalled in committee out and onto the floor. The process involves getting a majority of all House members to sign a **discharge petition**. If 218 members sign, then the petition can be voted on; if it passes, then the stalled bill goes directly to the floor for a vote. These procedures are rarely attempted and even more rarely succeed.

For a bill to come before either house, it must first be placed on a calendar. There are five of these in the House and two in the Senate. Though the bill goes onto a calendar, it is not necessarily considered in chronological order or even considered at all. In the House, the powerful Rules Committee—an arm of the party leadership, especially of the Speaker—reviews most bills and sets the rule (i.e., the procedures) under which they will be considered by the House. A **restrictive** or **closed rule** sets strict limits on debate and confines amendments to those proposed by the committee; an **open rule** permits amendments from the floor. The Rules Committee is no longer as mighty as it once was, but it still can block any House consideration of a measure, and can bargain with the legislative committee by offering a helpful rule in exchange for alterations in the substance of a bill. In the 1980s, closed rules became more common.

The House needs the Rules Committee to serve as a traffic cop; without some limitations on debate and amendment, nothing would ever get done. The House can bypass the Rules Committee in a number of ways, but it rarely does so unless the committee departs too far from the sentiments of the House.

No such barriers to floor consideration exist in the Senate, where bills may be considered in any order at any time whenever a majority of the Senate chooses. In practice, bills are scheduled by the majority leader in consultation with the minority leader.

## Floor Debate

Once on the floor, the bills are debated. In the House all revenue and most other bills are discussed by the *Committee of the Whole*—that is, whoever happens to be on the floor at the time, so long as at least 100 members are present. The Committee of the Whole can debate, amend, and generally decide the final shape of a bill but technically cannot

**joint resolution** A formal expression of congressional opinion that must be approved by both houses of Congress and by the president; constitutional amendments need not be signed by the president.

**discharge petition** A device by which any member of the House, after a committee has had the bill for 30 days, may petition to have it brought to the floor.

**restrictive** An order from the House Rules Committee that permits certain kinds of amendments but not others to be made into a bill on the floor.

**closed rule** An order from the House Rules Committee that sets a time limit on debate; forbids a bill from being amended on the floor.

**open rule** An order from the House Rules Committee that permits a bill to be amended on the floor.

**quorum** The minimum number of members who must be present for business to be conducted in Congress.

**riders** Amendments on matters unrelated to a bill that are added to an important bill so that they will “ride” to passage through the Congress. When a bill has many riders, it is called a Christmas-tree bill.

**cloture rule** A rule used by the Senate to end or limit debate.

**double tracking** A procedure to keep the Senate going during a filibuster in which the disputed bill is shelved temporarily so that the Senate can get on with other business.

**voice vote** A congressional voting procedure in which members shout “yea” in approval or “nay” in disapproval, permitting members to vote quickly or anonymously on bills.

**division vote** A congressional voting procedure in which members stand and are counted.

**roll-call vote** A congressional voting procedure that consists of members answering “yea” or “nay” to their names.

pass it—that must be done by the House itself, for which the **quorum** is half the membership (218 representatives). The sponsoring committee guides the discussion, and normally its version of the bill is the version that the full House passes.

Procedures are a good deal more casual in the Senate. Measures that have already passed the House can be placed on the Senate calendar without a committee hearing. There is no Committee of the Whole and no rule (as in the House) limiting debate, so that filibusters—lengthy speeches given to prevent votes from being taken—and irrelevant amendments, called **riders**, are possible. Filibusters can be broken if three-fifths of all senators resolve to invoke the **cloture rule**. This is a difficult and rarely used procedure; both conservatives and liberals have found the filibuster useful, and therefore its abolition is unlikely.

The sharp increase in Senate filibusters has been made easier by a new process called double tracking. When a senator filibusters against a bill, it is temporarily put aside so the Senate can move on to other business. Because of **double tracking**, senators no longer have to speak around the clock to block a bill. Once they talk long enough, the bill is shelved. So common has this become that, for all practical purposes, any controversial bill can pass the Senate only if it gets enough votes (60) to end a filibuster.

The Senate has made an effort to end filibusters aimed at blocking the nomination of federal judges. In 2005, seven Democrats and seven Republicans agreed not to filibuster a nomination except in “exceptional circumstances.” A few

nominees whose appointments had been blocked managed to get confirmed by this arrangement. While this truce held for several years, it did not last forever. In 2013, Democrats under Majority Leader Harry Reid used a parliamentary tactic

to block filibusters of nominations (except for the Supreme Court and certain other offices). This means that nominations can advance on a simple majority vote, rather than needing 60 votes.<sup>41</sup> What happens to this rule in the future remains to be seen.

One rule was once common to both houses; courtesy, often of the most exquisite nature, was required. Members always referred to each other as “distinguished” even if they were mortal political enemies. Personal or ad hominem criticism was frowned upon, but of late it has become more common. In recent years, members of Congress—especially of the House—have become more personal in their criticisms of one another, and human relationships have deteriorated.

## Methods of Voting

There are several methods of voting in Congress, which can be applied to amendments to a bill as well as to the question of final passage. Some observers of Congress mistakenly decide who was for and who against a bill by the final vote. This can be misleading. Often, a member of Congress will vote for final passage of a bill after having supported amendments that, if they had passed, would have made the bill totally different. To keep track of someone’s voting record, therefore, it is often more important to know how that person voted on key amendments than how he or she voted on the bill itself.

Finding that out is not always easy, though it has become simpler in recent years. The House has three procedures for voting. A **voice vote** consists of the members shouting “aye” or “no”; a **division** (or standing) **vote** involves the members standing and being counted. In neither case are the names recorded of who voted which way. This is done only with a **roll-call vote**. Since 1973, an electronic voting system has been in use that greatly speeds up roll-call votes, and thus the number of recorded votes has increased sharply. To ensure a roll-call vote, one-fifth of House members present must request it. Voting in the Senate is simpler; it votes by voice or by roll call; they do not use a **teller vote** or electronic counters.

If a bill passes the House and Senate in different forms, the differences must be reconciled for the bill to become law. If they are minor, the last house to act simply may refer the bill back to the other house, which then accepts the alterations. Major differences must be ironed out in a conference committee, though only a minority of bills requires a conference. Each house must vote to form such a committee. The members are picked by the chairs of the standing committees that have been handling the legislation; the minority as well as the majority party is represented. No decision can be made unless approved by a majority of *each* delegation. Bargaining is long and hard; in the past it was also secret, but some sessions are now public. Often—as with Carter’s energy bill—the legislation is substantially rewritten in conference. Theoretically nothing already agreed upon by both the House and Senate is to be changed, but in the inevitable give-and-take, even those matters already approved may be modified.

Conference reports on spending bills usually split the difference between the House and Senate versions. Overall, the Senate tends to do slightly better than the House.<sup>42</sup> But

whoever wins, conferees report their agreement back to their respective houses, which usually consider the report immediately. The report can be accepted or rejected; it cannot be amended. In the great majority of cases, it is accepted—the alternative is to have no bill at all, at least for that Congress.

The bill, now in final form, goes to the president for signature or **veto**. A vetoed bill returns to the house of origin, where an effort can be made to override the veto. Two-thirds of those present (provided there is a quorum) must vote, by roll call, to override. If both houses override, the bill becomes law without the president's approval.

## Legislative Productivity

In recent years, political scientists have studied how productive Congress has been and whether the post-9/11 Congress has performed especially well or especially poorly. The first issue concerns how best to measure the body's major and minor "legislative productivity." It is clear that Congress passed and funded an enormous number of bills in response to the Great Depression in the 1930s and in the mid-1960s, mainly in conjunction with that era's "war on poverty." And most scholars agree that in recent decades the body's legislative output has often slowed or declined.<sup>43</sup> Indeed, the 112th (2011–2013) and 113th (2013–2015) passed the fewest bills of any Congress in the post-World War II era, making them the least productive Congresses of that period.<sup>44</sup>

The second issue is how best to evaluate changes in the legislation Congress produces from one time period to the next. For instance, some scholars argue that the relatively low levels of legislative output of the late 1990s, together with decreases in the body's oversight hearings and related activities, betokened an institutional decline of Congress.<sup>45</sup> Others disagree, however, and argue that Congress is not as dysfunctional as many claim.<sup>46</sup>

The third issue is whether **divided government** (one party in control of the presidency and the other in charge of one or both chambers of Congress) decreases legislative productivity. Although there are some exceptions, most studies of the subject suggest that divided party government reduces the passage of only the most far-reaching and costly legislation.<sup>47</sup> As we discuss in Chapter 10, divided party government does not lead inevitably to "policy gridlock"—any more than **unified government** (a single party in power in the White House and in both chambers of Congress) makes it easy or inevitable to enact ever more sweeping laws.

The fourth issue involves so-called **earmarks**—congressional provisions that direct the federal government to fund specific projects, or to exempt specific persons or groups from paying specific federal taxes or fees. Earmarks have tripled since 1994; in 2006 alone, nearly 13,000 earmarks cost about \$64 billion.<sup>48</sup> Earmarks are legally binding, but few appear in a bill's text; rather, most are "hidden" in conference reports not subject to amendment.

This form of "legislative productivity" is criticized by most scholars, and at least in principle by most citizens. Earmarks figured in the scandals surrounding lobbyist Jack Abramoff and convicted Congressman Randy "Duke" Cunningham;

Barack Obama and John McCain argued against earmarks during the 2008 presidential campaign. Still, in one form or another earmarks have proliferated, because individuals and institutions—including not just businesses but also private universities, hospitals, and other nonprofit organizations—persist in demanding them from constituency-oriented members of Congress. Responding to public criticism, Congress banned earmarks in 2011. However, because the allure of earmarks proved too tempting, members quickly found workarounds that accomplish many of the same goals under different names.<sup>49</sup>

The fifth issue is how the post-9/11 Congress has legislated on matters directly relevant to homeland security, especially its own. The Framers crafted Congress as an institution that favors deliberation over dispatch; that acts boldly only when backed by a persistent popular majority, or a broad consensus among its leaders, or both; and is slow to change its time-honored procedures and structures.

But intelligence officials believe that a fourth plane involved in the 9/11 terrorist attacks was headed for the Capitol. In its June 2003 report, the bipartisan Continuity of Government Commission concluded that "the greatest hole in our constitutional system is the possibility of a terrorist attack that would kill or injure many members of Congress."<sup>50</sup>

This "hole" is relatively small with respect to the Senate. The Seventeenth Amendment allows the emergency replacement of senators by the governors of their states provided the state legislature allows it; otherwise, the governors must call for new elections. But the problem is greater for the House, where vacancies can be filled only by special elections, a process that can take many months.

Congress has enacted some, but by no means all, of the 9/11 Commission's recommendations.<sup>51</sup> But as of 2015, more than a decade after the 9/11 attacks on the United States, it had failed to enact comprehensive legislation or proposals for constitutional amendments to ensure that "the first branch" can continue to function should a terrorist attack kill or incapacitate many or most of its members.

**teller vote** A congressional voting procedure in which members pass between two tellers, the "yeas" first and the "nays" second.

**veto** Literally, "I forbid": it refers to the power of a president to disapprove a bill; it may be overridden by a two-thirds vote of each house of Congress.

**divided government** One party controls the White House and another party controls one or both houses of Congress.

**unified government** The same party controls the White House and both houses of Congress.

**earmarks** "Hidden" congressional provisions that direct the federal government to fund specific projects or that exempt specific persons or groups from paying specific federal taxes or fees.





## HOW WE COMPARE

### Number of Legislators

Writing in *Federalist* No. 55, James Madison insists that in any legislative body the number of legislators “ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude.”

America has heeded Madison’s advice. With 435 members of the House and 100 members of the Senate, the Congress has a total of 535 members representing more than 321 million citizens, or roughly one national legislator for every 600,000 citizens.

In most democracies, the ratio of national legislators to citizens is far higher than it is in the United States. For example, with a population of just over 60 million, the British Parliament’s two houses total more than 1,300 members, or roughly one national legislator for every 48,000 citizens; and, with a population of about 10 million, Sweden’s legislature has nearly 350 members, or roughly one national legislator for every 27,100 citizens.

At the same time, however, America has more numerous and more powerful subnational legislators (more than 7,300 in all) than most other nations do, including, in Madison’s home state of Virginia, 140 state lawmakers representing about 8 million citizens, or roughly one state lawmaker for every 57,000 citizens.

Also, the U.S. Constitution would permit the U.S. House to expand enough to approximate the representation ratios of nations like the United Kingdom and Sweden and states like Virginia: Article 1, section 2 states that “the Number of Representatives shall not exceed one for every thirty Thousand.”

Thus, given 300 million citizens, the Constitution would allow there to be as many as 10,000 members of the U.S. House (300 million divided by 30,000). But the mere thought heralds Madison’s warning, harkening back to ancient Greece’s large legislatures, that even if “every Athenian citizen had been a Socrates, every Athenian assembly would have been a mob.”

legislation in a timely fashion. Some of these proposals—for example, campaign finance reforms (see Chapter 8)—have recently become law, though most remain just proposals.

Many would-be reformers share the view that Congress is overstaffed and self-indulgent. It is, they complain, quick to impose new laws on states, cities, businesses, and average citizens but slow to apply those same laws to itself and its members. It is quick to pass **pork-barrel legislation**—bills that give tangible benefits (highways, dams, post offices) to constituents in the hope of winning their votes in return—but slow to tackle complex and controversial questions of national policy. The reformers’ image of Congress is unflattering, but is it wholly unwarranted?

No perk is more treasured by members of Congress than the frank. Members of Congress are allowed by law to send material through the mail free of charge by substituting their facsimile signature (*frank*) for postage. But rather than using this **franking privilege** to keep their constituents informed about the government, most members use franked newsletters and questionnaires as campaign literature. That is why use of the frank soars in the months before an election. Thus, the frank amounts to a taxpayer subsidy of members’ campaigns, a perk that bolsters the electoral fortunes of incumbents. While Congress has not removed the frank altogether, it has put limits on franking in recent years that have reduced the cost and extent of such mailings dramatically over time.<sup>52</sup>

For years, Congress routinely exempted itself from many of the laws it passed. In defense of this practice, members said that if members of Congress were subject to, for example, the minimum-wage laws, the executive branch (charged with enforcing these laws) would acquire excessive power over Congress. This would violate the separation of powers. But as public criticism of Congress grew and confidence in government declined, more and more people demanded that Congress subject itself to the laws that applied to everybody else. In 1995, the 104th Congress did this by passing a bill that obliges Congress to obey 11 important laws governing things such as civil rights, occupational safety, fair labor standards, and family leave.

The bipartisan Congressional Accountability Act of 1995 had to solve a key problem: under the constitutional doctrine of separated powers, it would have been unwise, and perhaps unconstitutional, for the executive branch to enforce congressional compliance with executive-branch regulations. So Congress created the independent Office of Compliance and an employee grievance procedure to deal with implementation. Now Congress, too, must obey laws such as the Civil Rights Act, the Equal Pay Act, the Age Discrimination Act, and the Family and Medical Care Leave Act.

As already mentioned, bills containing money for local dams, bridges, roads, and monuments are referred to disparagingly as pork-barrel legislation. Reformers complain that when members act to “bring home the bacon,” Congress misallocates tax dollars by supporting projects with trivial social benefits in order to bolster their reelection prospects.

No one can doubt the value of trimming unnecessary spending, but pork is not necessarily the villain it is made

## 9-6 Reforming Congress

While most citizens are only vaguely familiar with the rules and procedures under which Congress operates, they do care whether Congress as an institution serves the public interest and fulfills its mission as a democratic body. Over the last several decades, many proposals have been made to reform and improve Congress—term limitations, new ethics and campaign finance laws, and organizational changes intended to reduce the power and perks of members while making it easier for Congress to pass needed



out to be. For example, the main cause of the budget deficit was the increase in spending on entitlement programs (such as health care and interest on the national debt) without a corresponding increase in taxes. Spending on pork is a small fraction of total annual federal spending (about 2.5 percent, on average, from 1993 to 2005).<sup>53</sup> By 2015, what most observers would count as pork spending was below 1 percent of total federal spending.

Of course, one person's pork is another person's necessity. No doubt some congressional districts get an unnecessary bridge or highway, but others get bridges and highways that are long overdue. The notion that every bridge or road a member of Congress gets for his or her district is wasteful pork is tantamount to saying that no member attaches any importance to merit.

Even if all pork were bad, it would still be necessary. Congress is an independent branch of government, and each member is, by constitutional design, the advocate of his or her district or state. No member's vote can be won by coercion, and few can be had by mere appeals to party loyalty or presidential needs. Pork is a way of obtaining consent.

The only alternative is bribery—but bribery, besides being wrong, would benefit only the member, whereas pork usually benefits voters in the member's district. If you want to eliminate pork, you must eliminate Congress, by converting it into a parliament under the control of a powerful party leader or prime minister. In a tightly controlled parliament, no votes need be bought; they can be commanded. But members of such a parliament can do little to help their constituents cope with government or to defend them against bureaucratic abuses, nor can they investigate the conduct of the executive branch. The price of a citizen-oriented Congress is a pork-oriented Congress.

### **pork-barrel legislation**

Legislation that gives tangible benefits to constituents in several districts or states in the hope of winning their votes in return.

### **franking privilege**

The ability of members to mail letters to their constituents free of charge by substituting their facsimile signature for postage.

## LEARNING OBJECTIVES .....

### **9-1 Contrast congressional and parliamentary systems.**

A congress differs from a parliament in three basic ways: how one becomes a member, what one does as a member, and how the leader is chosen. To run for parliament, a party puts your name on the ballot; to run for congress, you enter and win a primary and general election. In a parliament, the individual members have less power, and their main decision is whether or not to support the government. In a parliament, the prime minister (leader) is selected by the majority party from among its members; in a congressional system, the people pick the president.

### **9-2 Trace the evolution of Congress in American politics.**

The Framers of the Constitution created a bicameral legislature—the House and Senate—to ensure that power would be shared in the national government. Due to its larger size, the House has always been more centralized than the Senate, but since the 1950s, more power has devolved to individual members. The most significant change in the evolution of the Senate is the 17th Amendment, which made senators directly elected by the people. The rise of the filibuster, or tradition of unlimited debate in the Senate, also is an important development in the institution.

### **9-3 Discuss who serves in Congress and what influences their votes.**

Demographically, members of Congress share few similarities with the American public. Ideologically, Republican members of Congress are more conservative than average Americans, and Democratic members of Congress are more liberal than average Americans. But many factors influence how legislators vote, including their constituents' interests, political party priorities, and their own political beliefs.

### **9-4 Summarize the organization of Congress.**

Congress is composed of numerous committees in each chamber, including standing committees, select committees, joint committees, and conference committees. Members of Congress also have their own staffs, as do congressional committees. Congress also has specialized agencies, such as the Congressional Budget Office and the Government Accountability Office, to assist in its operations.

### **9-5 Explain how a bill becomes a law.**

A bill must undergo a lengthy policymaking process and overcome many hurdles to become a law. Briefly, a bill must be introduced in the House or Senate (all revenue-raising bills must originate in the House), be approved by each chamber (usually after undergoing extensive committee and subcommittee review),

be reviewed by a conference committee and then approved again by both chambers, and then signed by the president. If a bill is not passed in a congressional session, which lasts for two years, then it must be reintroduced in the next Congress and go through the entire process again.

### 9-6 Discuss possibilities for congressional reform.

Some people say Congress should function more like a parliamentary system, where the majority party

selects the executive, and the political structure encourages executive–legislative cooperation. Others propose longer terms for members of the House and Senate, to permit more time for policymaking. Other democracies have such political systems, but they would fundamentally change the system of Madisonian democracy that has endured for more than 225 years.

## TO LEARN MORE .....

House of Representatives: [www.house.gov](http://www.house.gov)

Senate: [www.senate.gov](http://www.senate.gov)

Library of Congress: [www.loc.gov](http://www.loc.gov)

#### For News about Congress:

Roll Call magazine: [www.rollcall.com](http://www.rollcall.com)

C-SPAN: [www.c-span.org](http://www.c-span.org)

Arnold, R. Douglas. *The Logic of Congressional Action*. New Haven, CT: Yale University Press, 1990. A masterful analysis of how Congress sometimes passes bills that serve the general public, not just special interests.

Fenno, Richard F., Jr. *Congressmen in Committees*. Boston: Little Brown 1973. Classic study of the styles of 12 standing committees.

Fiorina, Morris P. *Congress: Keystone of the Washington Establishment*, 2nd ed. New Haven, CT: Yale University Press, 1989. Argues that congressional behavior is aimed at guaranteeing the members' chances for reelection.

Jacobson, Gary. *The Politics of Congressional Elections*, 8th ed. New York: Pearson, 2012. An authoritative study of how members of Congress are elected.

Mann, Thomas E., and Norman J. Ornstein, *Broken Branch: How Congress Is Failing America and How to Get It Back on Track*, 2nd ed. New York: Oxford University Press, 2008. Critically compares the post-1994 Congress to its predecessors and suggests several major reforms.

Poole, Keith T., and Howard Rosenthal. *Congress: A Political-Economic History of Roll Call Voting*. New York: Oxford University Press, 1997. Sophisticated study of why members of Congress vote as they do and how relatively stable congressional voting patterns have been throughout American history.

Sundquist, James L. *The Decline and Resurgence of Congress*. Washington, D.C.: Brookings Institution, 1981. A history of the fall and, after 1973, the rise of congressional power vis-à-vis the president.

Taylor, Andrew J. *Congress: A Performance Appraisal*. Boulder, CO: Westview Press, 2013. Offers evidence and arguments to suggest that the present-day Congress is not the dysfunctional body that the mass public and many scholars believe it to be.



## CHAPTER 10

# The Presidency

### LEARNING OBJECTIVES

- 10-1** Explain how presidents differ from prime ministers and discuss the rise of divided government in the United States.
- 10-2** Summarize how the constitutional and political powers of the presidency have evolved from the founding of the United States to the present.
- 10-3** Explain the importance of persuasion for presidential policymaking.
- 10-4** Discuss why presidential organization matters for policymaking.
- 10-5** Describe presidential transitions and their consequences for presidential power.



## THEN

When the Framers wrote the Constitution in the summer of 1787, they did not have a ready consensus on how to select the chief executive or define the powers of the office. James Wilson of Pennsylvania wanted the president to be elected by the people; Roger Sherman of Connecticut wanted him elected by Congress. Wilson's view got almost no support, because the size of the United States (as large as England, Ireland, France, Germany, and Italy combined in 1787) made it unlikely that anybody save George Washington could obtain a popular majority. Sherman's view got a lot of support, but many delegates worried that the president would become nothing more than a tool of Congress. Ultimately, the Committee on Postponed Matters, a small subset of the group, suggested creating an electoral college to choose the president. The Framers approved the plan, but as they thought candidates would have difficulty winning a majority in the electoral college, they expected that the House of Representatives ultimately would decide most elections.

## NOW

More than 200 years later, the electoral college endures, and the House has not chosen a president since 1824. The stability of this institution is surprising, given that the Framers settled on it as a last-minute compromise, and yet it is the only part of the presidential campaign process that the Framers would recognize in the 21st century. The lengthy road to the nomination, 24-hour media coverage, and extensive fundraising—the 2012 presidential race cost more than \$2.5 billion for the two major-party candidates, their political parties, and independent organizations, and the 2016 race was widely expected to double in cost<sup>1</sup>—are all standard features of modern presidential selection. Furthermore, the weighty demands of winning the White House affect how the victorious candidate governs as president. As you read this chapter, think about which features of the American presidency make sense today and which might merit change. Keep in mind that the Framers were not necessarily wedded to all aspects of the institution they created, nor could they have anticipated how technology and other factors would change it.

## 10-1 Presidents and Prime Ministers

The popularly elected president is an American invention. Of the roughly five dozen countries in which there is some degree of party competition and presumably, some measure of free choice for the voters, only 16 have a directly elected president; and 13 of these are nations of North and South America. The democratic alternative is for the chief executive to be a prime minister, chosen by and responsible to the parliament. This system prevails in most Western European countries as well as in Israel and Japan. There is no nation with a purely presidential political system in Europe; France combines a directly elected president with a prime minister and parliament.<sup>2</sup>

In a parliamentary system, the prime minister is the chief executive. The prime minister is chosen not by the voters but by the legislature, and he or she in turn selects the other ministers from the members of parliament. If the parliament has only two major parties, the ministers usually will be chosen from the majority party; if there are many parties (as in Israel), several parties may participate in a coalition cabinet. The prime minister remains in power as long as his or her party has a majority of the seats in the legislature, or as long as the coalition he or she has assembled holds together. The voters choose who is to be a member of parliament—usually by voting for one or another party—but cannot choose who is to be the chief executive officer. Whether a nation has a presidential or a parliamentary system makes a big difference in the identity and powers of the chief executive.

People become president by winning elections, and sometimes winning is easier if you can show the voters that you are not part of “the mess in Washington.” Prime ministers are selected from among people already in parliament, and so they are always insiders. In the United States, thirty-two different people were elected president between 1828 and 2012. Of these, the great majority were governors, military leaders, or vice presidents; just 13 percent were legislators immediately before becoming president.



**IMAGE 10-1** *The first cabinet: left to right, Secretary of War Henry Knox, Secretary of State Thomas Jefferson, Attorney General Edmund Randolph, Secretary of the Treasury Alexander Hamilton, and President George Washington.*

FPG/Archive Photos/Getty Images

Under the Constitution, no sitting member of Congress can hold office in the executive branch. The persons chosen by a prime minister to be in the cabinet are almost always members of parliament.

Of the 15 heads of cabinet-level departments in the first George W. Bush administration, only four had been members of Congress. The rest, as is customary with most presidents, were close personal friends or campaign aides, representatives of important constituencies (e.g., farmers, African Americans, or women), experts on various policy issues, or some combination of all three. The prime minister of the United Kingdom, by contrast, picks all of his or her cabinet ministers from among members of Parliament. This is one way by which the prime minister exercises control over the legislature.

A prime minister's party (or coalition) always has a majority in parliament; if it did not, somebody else would be prime minister. A president's might not have a congressional majority; instead, the opposite party may control Congress. Cooperation between the two branches, hard to achieve under the best of circumstances, may then be reduced further by partisan bickering. Even when one party controls both the White House and Congress, the two branches often work at cross-purposes.

When Kennedy was president, his party (the Democrats) held a big majority in the House and the Senate. Yet Kennedy was frustrated by his inability to get Congress to approve proposals to enlarge civil rights, supply federal aid for school construction, create a Department of Urban Affairs and Housing, or establish a program of subsidized medical care for older adults. During his last year in office, Congress passed only about one-fourth of his proposals. Carter did not fare much better; even though the Democrats controlled Congress, many of his most important proposals were defeated or greatly modified. Only Franklin Roosevelt (1933–1945) and Lyndon Johnson (1963–1969) had even brief success in leading Congress, and for Roosevelt, most of that success was confined to his first term or to wartime.

In the sixty-plus years from 1952 through 2016, there were 33 congressional elections and 17 presidential elections. Twenty of the 33 produced **divided government**—a government in which one party controls the White House and a different party controls one or both chambers of Congress. When Donald Trump was elected president in 2016, it became only the fifth time since 1969 that the same party would control the White House and both chambers of Congress, creating a **unified government**.

The inauguration of President George W. Bush in 2001 had marked the first time since 1953 that the Republicans were fully in charge of both branches of government (they controlled the White House and the Senate from 1981 to 1987). But not long after the Senate convened, one Republican, James Jeffords of Vermont, announced that he was an independent and voted with the Democrats. Divided government returned until an additional Republican was elected to the Senate in 2002. But the Democrats retook control in 2007 and increased their majorities in both chambers two years later—even gaining the 60 votes necessary to halt filibusters in the Senate, following a contested Minnesota race that ended with Democrat Al Franken being declared

the winner and seated. They lost their filibuster-proof majority in 2010, when Republican Scott Brown won a surprise victory to fill the seat of recently deceased Senator Ted Kennedy of Massachusetts. And President Obama faced partially divided government after two years in office, with a Republican-led House and a narrowly Democratic Senate, a division of power that continued even after Obama won reelection in 2012. In 2014, Republicans increased their majority in the House and won control of the Senate as well, resulting in fully divided government for the last two years of the Obama presidency. In 2016, Donald Trump's victory in the presidential race combined with continued Republican control of the House and Senate meant that Washington would have unified government for the first time since the start of the Obama presidency.

Americans say they don't like divided government. They, or at least the pundits who claim to speak for them, think divided government produces partisan bickering, political paralysis, and policy gridlock. During the 1990 battle between President Bush and a Democratic Congress, one magazine compared it to a movie featuring the Keystone Kops, characters from the silent movies who wildly chased each other around while accomplishing nothing.<sup>3</sup> In the 1992 campaign, Bush, Clinton, and Ross Perot bemoaned the “stalemate” that had developed in Washington. When Clinton was sworn in as president, many commentators spoke approvingly of the “end of gridlock.”

There are two things wrong with these complaints. First, it is not clear that divided government produces a gridlock that is any worse than that which exists with unified government. Second, it is not clear that, even if **gridlock** does exist, it is always, or even usually, a bad thing for the country.

## Does Gridlock Matter?

Despite the well-publicized stories about presidential budget proposals being ignored by Congress (Democrats used to describe Reagan's and Bush's budgets as being “dead on arrival”), it is not easy to tell whether divided governments produce fewer or worse policies than unified ones. The scholars who have looked closely at the matter have, in general, concluded that divided governments do about as well as unified ones in passing important laws, conducting important investigations, and ratifying significant treaties.<sup>4</sup> Political scientist David Mayhew studied 267 important laws that were enacted between 1946 and 1990. These laws were as likely to be passed when different parties controlled the White House and Congress as when the same party controlled both branches.<sup>5</sup> For example, divided governments produced the 1948 Marshall Plan to rebuild war-torn Europe and the 1986 Tax Reform Act.

**divided government**  
One party controls the White House and another party controls one or both houses of Congress.

**unified government**  
The same party controls the White House and both houses of Congress.

**gridlock** The inability of the government to act because rival parties control different parts of the government.

Why do divided governments produce about as much important legislation as unified ones? The main reason is that “unified government” is something of a myth. Just because the Republicans control both the presidency and Congress does not mean that the Republican president and the Republican senators and representatives will see things the same way. For one thing, Republicans are themselves divided between conservatives (mainly from the South) and more moderate members (largely from the Midwest and West). They disagree about policy almost as much as Republicans and Democrats disagree. For another thing, the Constitution ensures that the president and Congress will be rivals for power and thus rivals in policymaking. That’s what the separation of powers and checks and balances are all about.

As a result, periods of unified government often are not so unified. Democratic president Lyndon Johnson could not get many Democratic members of Congress to support his war policy in Vietnam. Democratic president Jimmy Carter could not get the Democratic-controlled Senate to ratify his strategic arms-limitation treaty. Democratic president Bill Clinton could not get the Democratic Congress to go along with his policy on gays in the military or his health care proposals; and when the heavily revised Clinton budget did pass in 1993, it was by just one vote.

The only time there really is a unified government is when not just the same party but the same *ideological wing* of that party is in effective control of both branches of government. This was true in 1933 when Franklin Roosevelt was president and change-oriented Democrats controlled Congress, and it was true again in 1965 when Lyndon Johnson and liberal Democrats dominated Congress. Both were periods when many major policy initiatives became law: Social Security, business regulations, Medicare, and civil rights legislation. But these periods of ideologically unified government are very rare.

Gridlock, to the extent that it exists, is a necessary consequence of a system of representative democracy. Such a system causes delays, intensifies deliberations, forces compromises, and requires the creation of broad-based coalitions to support most new policies. This system is the opposite of direct democracy. If you believe in direct democracy, you believe that what the people want on some issue should become law with as little fuss and bother as possible. Political gridlocks are like traffic gridlocks; people get overheated, things boil over, nothing moves, and nobody wins—except journalists who write about the mess and lobbyists who charge big fees to steer their clients around the tie-up. In a direct democracy, the president would be a traffic cop with broad powers to decide in what direction the traffic should move and to make sure that it moves that way.

But if unified governments are not really unified—if in fact they are split by ideological differences within each party and by the institutional rivalries between the president and Congress—then this change is less important than it may seem. What *is* important is the relative power of the president and Congress. That has changed greatly.



## HOW WE COMPARE

### Presidential Systems

Most modern democracies feature one of three systems:

- Parliamentary systems (like the United Kingdom) in which prime ministers are selected by a legislative majority and can be removed by a legislative majority at virtually any time;
- Presidential systems (like the United States) in which the president and the legislators are elected separately and serve fixed terms, with the president subject to removal by the legislature only under extreme circumstances (e.g., in the United States, impeachment by the House and removal from office by the Senate); or
- Semi-presidential systems (like France) in which there is a prime minister selected and subject to removal by a parliamentary majority, as well as a president who is elected separately.

Using a multidimensional definition of “democratic,” in 1950, about 60 percent of democratic nations had parliamentary systems, 30 percent had semi-presidential systems, and 10 percent had presidential systems. Today, however, about two-thirds of all democratic nations have systems that are either semi-presidential (about 36 percent) or presidential (about 30 percent).

Are elected officials and party leaders in presidential systems, like that in the United States, more or less likely to deliver on campaign promises than are their counterparts in the other two systems? The most in-depth studies to date say “less likely.” The rate at which a party in power pursues the policies it offered to voters in its platform is generally lower in presidential systems; and the incidence of “policy-switching” (pursuing policies directly contrary to those promised during the campaign) is more than four times as common in presidential systems as it is in parliamentary systems, with semi-presidential systems being in the middle.

**Sources:** David Samuels and Matthew Shugart, *Presidents, Parties, and Prime Ministers: How the Separation of Powers Affects Party Organization and Behavior* (New York: Cambridge University Press, 2010); “Presidents, Prime Ministers, and Mandate Representation: A Global Test,” paper prepared for presentation at the 2006 Annual Meeting of the American Political Science Association, Philadelphia, Pennsylvania.

## 10-2 The Powers of the President

Though the president cannot command an automatic majority in the legislature, unlike a prime minister, he does have some formidable, albeit vaguely defined, powers. The Framers of the Constitution designed the executive office with limited powers; but over time, the presidency has evolved to assume increasing political responsibilities and face heightened public expectations, even as the institution’s constitutional powers have remained largely the same.



The president's official powers are mostly set forth in Article II of the Constitution and are of two sorts: those the president can exercise without formal legislative approval, and those that require the consent of the Senate or of Congress as a whole.

### Powers of the President Alone

- Serve as commander-in-chief of the armed forces
- Commission officers of the armed forces
- Grant reprieves and pardons for federal offenses (except impeachment)
- Convene Congress in special sessions
- Receive ambassadors
- Take care that the laws be faithfully executed
- Wield the “executive power”
- Appoint officials to lesser offices

### Powers the President Shares with The Senate

- Make treaties
- Appoint ambassadors, judges, and high officials

### Powers the President Shares with Congress as A Whole

- Approve legislation

Taken alone and interpreted narrowly, this list of powers is not very impressive. Obviously, the president's authority

as commander-in-chief is important, but construed literally, most of the other constitutional grants seem to provide for little more than a president who is chief clerk of the country. A hundred years after the Founding, that is how matters appeared to even the most astute observers. In 1884, Woodrow Wilson wrote a book about American politics titled *Congressional Government*, in which he described the business of the president as “usually not much above routine,” mostly “mere administration.” The president might as well be an officer of the civil service. To succeed, he need only obey Congress and stay alive.<sup>6</sup>

But even as Wilson wrote, he was overlooking some examples of enormously powerful presidents, such as Abraham Lincoln; and he was not sufficiently attentive to the potential for presidential power found in the more ambiguous clauses of the Constitution, as well as in the political realities of American life. The president's authority as commander-in-chief has grown—especially, but not only, in wartime—to encompass not simply the direction of the military forces, but also the management of the economy and the direction of foreign affairs as well. A quietly dramatic reminder of the president's military powers—and the magnitude of their implications—occurs at the precise instant that a new president assumes office. A military officer carrying a locked briefcase moves from the side of the outgoing president to the side of the new one. In the briefcase are the secret codes and orders that permit the president to authorize the launching of American nuclear weapons.

The president's duty to “take care that the laws be faithfully executed” has become one of the most elastic phrases in the Constitution. By interpreting this broadly, Grover Cleveland was able to use federal troops to break a labor strike in the 1890s, and Dwight Eisenhower was able to send troops to help integrate a public school in Little Rock, Arkansas, in 1957.



AP Images/Cliff Owen

**IMAGE 10-2** A military aide to the president carries a leather briefcase containing the classified nuclear war plan, popularly known as the “football,” up the steps of Air Force One.

**electoral college**

The people chosen to cast each state's votes in a presidential election. Each state can cast one electoral vote for each senator and representative it has. The District of Columbia has three electoral votes, even though it cannot elect a representative or senator.

The greatest source of presidential power, however, is not found in the Constitution at all but in politics and public opinion. Increasingly since the 1930s, Congress has passed laws that confer on the executive branch broad grants of authority to achieve some general goals, leaving it up to the president and his deputies to define the regulations and programs that will actually be put into effect. In Chapter 11, we see how this delegation of legislative power to the president

has contributed to the growth of the bureaucracy. Moreover, the American people—always in times of crisis, but increasingly as an everyday matter—look to the president for leadership and hold him responsible for a large and growing portion of our national affairs. The public thinks, wrongly, that the presidency is the “first branch” of government.

Not surprisingly, given the preeminence of the presidency in American politics today, few issues inspired as much debate or concern among the Framers in 1787 as the problem of defining the chief executive. The delegates feared anarchy and monarchy in about equal measure. When the Constitutional Convention met, the existing state constitutions gave most, if not all, power to the legislatures. In eight states, the governor actually was chosen by the legislature, and in 10 states, the governor could not serve more than one year. Only in New York, Massachusetts, and Connecticut did governors have much power or serve for any length of time.

The delegates in Philadelphia (and later the critics of the new Constitution during the debate over its ratification) worried about aspects of the presidency that were quite different from those that concern us today. In 1787–1789, some Americans suspected that the president, by being able to command the state militia, would use the militia to overpower state governments. Others were worried that if the president were allowed to share treaty-making power with the Senate, he would be “directed by minions and favorites” and become a “tool of the Senate.”

But the most frequent concern was over the possibility of presidential reelection. Americans in the late 18th century were sufficiently suspicious of human nature and sufficiently experienced in the arts of mischievous government to believe that a president, once elected, would arrange to stay in office in perpetuity by resorting to bribery, intrigue, and force. This might happen, for example, every time the presidential election was thrown into the House of Representatives because no candidate had received a majority of the votes in the electoral college—a situation that most people expected to happen frequently.

In retrospect, these concerns seem misplaced, even foolish. The power over the militia has had little significance; the election has gone to the House only twice (1800 and 1824); and though the Senate dominated the presidency off and on during the second half of the 19th century, it has not

done so recently. The real sources of the expansion of presidential power—the president's role in foreign affairs, his ability to shape public opinion, his position as head of the executive branch, and his claims to have certain “inherent” powers by virtue of his office—were hardly predictable in 1787. Nowhere in the world at that time was there an example of an American-style presidency, nor had there been at any time in history. It was a unique and unprecedented institution, and the Framers and their critics can be forgiven for not predicting accurately how it would evolve. At a more general level, however, they understood the issue quite clearly. Gouverneur Morris of Pennsylvania put the problem of the presidency this way: “Make him too weak: the Legislature will usurp his powers. Make him too strong: he will usurp on the Legislature.”

The Framers knew very well that the relations between the president and Congress and the manner in which the president is elected were of profound importance, and they debated both at great length. The first plan was for Congress to elect the president—in short, for the system to be quasi-parliamentary. But if that were done, some delegates pointed out, Congress could dominate an honest or lazy president, while a corrupt or scheming president might dominate Congress.

After much discussion, it was decided that the president should be chosen directly by voters. But by which voters? The emerging nation was large and diverse. It seemed unlikely that every citizen would be familiar enough with the candidates to cast an informed vote for a president directly. Worse, a direct popular election would give inordinate weight to the large, populous states, and no plan with that outcome had any chance of adoption by the smaller states.

## The Electoral College

Thus the **electoral college** was invented, whereby each of the states would select electors in whatever manner it wished. The electors would then meet in each state capital and vote for president and vice president. Many Framers expected that this procedure would lead to each state's electors' voting for a favorite son, and thus no candidate would win a majority of the popular vote. In this event, it was decided that the House of Representatives should make the choice, with each state delegation casting one vote.

The plan seemed to meet every test: large states would have their say, but small states would be protected by having a minimum of three electoral votes no matter how tiny their population. The small states together could wield considerable influence in the House, where it was expected widely that most presidential elections would ultimately be decided. Of course, it did not work out quite this way. The Framers did not foresee the role that political parties would play in producing nationwide support for a slate of national candidates.

## The First Presidents

Those who first served as president were among the most prominent men in the new nation, all active either in the movement for independence, in the Founding, or in both. Of the first five presidents, four (all but John Adams) served two



## CONSTITUTIONAL CONNECTIONS

### Executive Checks and Balances

In *Federalist* No. 70, Alexander Hamilton famously wrote of the need for “energy in the Executive,” which he defined as “unity” (a single president); “duration” (a term of office long enough for the Executive to be effective); “adequate provision for its support” (reasonable salary); and “competent powers” (the ability to fulfill the responsibilities of the office). Addressing fears that Article II of the Constitution made the Executive too powerful, Hamilton said the president would be checked by “a due dependence on the people” (elections) and

“a due responsibility” (commitment to the public good). Do these checks suffice to keep the Framers’ system of separation of powers/checks and balances intact, and the president accountable, in the 21st century?

**Source:** [Alexander Hamilton], *The Federalist* No. 70: The Executive Department Further Considered, March 15, 1788. Available online through The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School.

full terms. Washington and Monroe were not even opposed. The first administration had at the highest levels the leading spokesmen for all of the major viewpoints: Alexander Hamilton was Washington’s secretary of the treasury (and was sympathetic to urban commercial interests); Thomas Jefferson was secretary of state (and more inclined toward rural, small-town, and farming views). Washington spoke out strongly against political parties, and though parties soon emerged, there was a stigma attached to them. Many people believed that it was wrong to take advantage of divisions in the country, to organize deliberately to acquire political office, or to make legislation depend on party advantage. As it turned out, this hostility to party (or “faction,” as it was more commonly called) was unrealistic; parties are as natural to democracy as churches are to religion.

### The Jacksonians

At a time roughly corresponding to the presidency of Andrew Jackson (1829–1837), broad changes began to occur in American politics. These changes, together with the personality of Jackson himself, altered the relations between the president and Congress as well as the nature of presidential leadership. As so often happens, at the time Jackson took office few people had much sense of what his presidency would be like. Though he had been a member of the House of Representatives and of the Senate, he was elected as a military hero—and an apparently doddering one at that. Sixty-one years old and seemingly frail, he nonetheless used the powers of his office as no one had before him.

Jackson vetoed 12 acts of Congress, more than all his predecessors combined and more than any subsequent president until Andrew Johnson 30 years later. His vetoes were not simply on constitutional grounds but on policy ones; as the only official elected by the entire voting citizenry, he saw himself as the “Tribune of the People.” None of his vetoes were overridden. He did not initiate many new policies, but he struck out against the ones he did not like. He did so at a time when the size of the electorate was increasing rapidly, and new states, especially in the West, had entered the Union. (There were then 24 states in the Union, nearly twice the original number.)

Jackson demonstrated what a popular president could do. He did not shrink from conflict with Congress, and the tension intended by the Framers between the two branches of government was intensified by the personalities of those in government: Jackson in the White House, and Henry Clay, Daniel Webster, and John Calhoun in Congress. These powerful figures walked the political stage at a time when bitter sectional conflicts—over slavery and commercial policies—were beginning to split the country. Jackson, though he was opposed to a large and powerful federal government and wished to return somehow to the agrarian simplicities of Jefferson’s time, was nonetheless a believer in a strong and independent presidency. This view, though obscured by nearly a century of subsequent congressional dominance of national politics, was ultimately to triumph—for better or for worse.

### The Reemergence of Congress

With the end of Jackson’s second term, Congress quickly reestablished its power; and except for the wartime presidency of Lincoln and brief flashes of presidential power under James Polk (1845–1849) and Grover Cleveland (1885–1889, 1893–1897), the presidency for a hundred years was the subordinate branch of the national government. Of the eight presidents who succeeded Jackson, two (William H. Harrison and Zachary Taylor) died in office, and none of the others served more than one term. Schoolchildren, trying to memorize the list of American presidents, always stumble in this era of the “no-name” presidents. This is hardly a coincidence. Congress was the leading institution, struggling, unsuccessfully, with slavery and sectionalism.

During this long period of congressional—and usually senatorial—dominance of national government, only Lincoln broke new ground for presidential power. Lincoln’s expansive use of that power, like Jackson’s, was totally unexpected. He was first elected in 1860 as a minority president, receiving less than 40 percent of the popular vote in a field of four candidates. Though a member of the new Republican Party, he had been a member of the Whig Party, a group that had stood for limiting presidential power. He had opposed America’s entry into the Mexican War and had been critical of Jackson’s use of executive authority.



But as president during the Civil War, he made unprecedented use of the vague powers in Article II of the Constitution, especially those that he felt were “implied” or “inherent” in the phrase “take care that the laws be faithfully executed” and in the express authorization for him to act as commander-in-chief. Lincoln raised an army, spent money, blockaded Southern ports, temporarily suspended the writ of habeas corpus, and issued the Emancipation Proclamation to free the slaves—all without prior congressional approval. He justified this, as most Americans probably would have, by the emergency conditions created by civil war. In this he acted little differently from Thomas Jefferson, who while president waged undeclared war against various North African pirates.

After Lincoln, Congress reasserted its power and became the principal federal institution during Reconstruction and for many decades thereafter. But it had become abundantly clear that a national emergency could equip the president with great powers and that a popular and strong-willed president could expand his powers even without an emergency.

Except for the administrations of Theodore Roosevelt (1901–1909) and Woodrow Wilson (1913–1921), the president was, until the New Deal, at best a negative force—a source of opposition to Congress, not a source of initiative and leadership for it. Grover Cleveland was a strong personality, but for all his efforts he was able to do little more than veto bills that he did not like. He cast 414 vetoes—more than any other president until Franklin Roosevelt. Frequent targets of his vetoes were bills to confer special pensions on Civil War veterans.

Today we are accustomed to the idea that the president formulates a legislative program to which Congress then responds, but until the 1930s the opposite was more the case. Congress ignored the initiatives of such presidents as Grover Cleveland, Rutherford Hayes, Chester Arthur, and Calvin Coolidge. Woodrow Wilson in 1913 was the first president since John Adams to deliver personally the State of the Union address, and he was one of the first to develop and argue for a presidential legislative program.

Our popular conception of the president as the central figure of national government, devising a legislative program and commanding a large staff of advisers, is very much a product of the modern era and of the enlarged role of government. In the past, the presidency became powerful only during a national crisis (the Civil War, World War I) or because of an extraordinary personality (Andrew Jackson, Theodore Roosevelt, Woodrow Wilson). Since the 1930s, however, the presidency has been powerful no matter who occupied the office and whether or not there was a crisis. Because government now plays such an active role in our national life, the president is the natural focus of attention and the titular head of a huge federal administrative system (whether he is the real boss is another matter).

## 10-3 The Power to Persuade

The sketchy constitutional powers given to the president, combined with the lack of an assured legislative majority, mean that he must rely heavily on persuasion if he is to accomplish much. Here, the Constitution gives him some

advantages: he and the vice president are the only officials elected by the whole nation, and he is the ceremonial head of state as well as the chief executive of the government. The president can use his national constituency and ceremonial duties to enlarge his power, but he must do so quickly. The second half of his first term in office will be devoted to running for reelection, especially if he faces opposition for his own party's nomination (as was the case with Carter and Ford).

## The Three Audiences

The president's persuasive powers are aimed at three audiences. The first, and often the most important, is his Washington, D.C., audience of fellow politicians and leaders. As Richard Neustadt points out in his book *Presidential Power*, a president's reputation among his Washington colleagues is of great importance in affecting how much deference his views receive and thus how much power he can wield.<sup>7</sup> If a president is thought to be “smart,” “sure of himself,” “cool,” “on top of things,” or “shrewd,” and thus “effective,” he *will* be effective. Franklin Roosevelt had that reputation, and so did Lyndon Johnson, at least for his first few years in office. Truman, Ford, and Carter often did not have that reputation, and they lost ground accordingly. Power, like beauty, exists largely in the eye of the beholder.

A second audience is composed of party activists and officeholders outside Washington—the partisan grassroots. These persons want the president to exemplify their principles, trumpet their slogans, appeal to their fears and hopes, and help them get reelected. Since, as we explained in Chapter 9, partisan activists increasingly have an ideological orientation toward national politics, these people will expect “their” president to make fire-and-brimstone speeches that confirm in them a shared sense of purpose and, incidentally, help them raise money from contributors to state and local campaigns.

The third audience is “the public.” But of course that audience is really many publics, each with a different view or set of interests. A president on the campaign trail speaks boldly of what he will accomplish; a president in office speaks quietly of the problems that must be overcome. Citizens often are irritated at the apparent tendency of officeholders, including the president, to sound mealy-mouthed and equivocal. But it is easy to criticize the cooking when you haven't been the cook. A president learns quickly that every utterance will be scrutinized closely by the media and by organized groups here and abroad, and errors of fact, judgment, timing, or even inflection will be immediately and forcefully pointed out. Given the risks of saying too much, it is a wonder that presidents say anything at all.

Presidents have made fewer and fewer impromptu remarks in the years since Franklin Roosevelt held office, and instead have relied more and more on prepared speeches from which political errors can be removed in advance. Hoover and Roosevelt held six or seven press conferences each month, but every president from Nixon through Clinton has held barely one a month. Instead, modern presidents make formal speeches. A president's use of these speeches

often is called the **bully pulpit**, a phrase that means taking advantage of the prestige and visibility of the presidency to try to guide or mobilize the American people.

## Popularity and Influence

Despite the limits of the bully pulpit, presidents communicate with the public in an attempt to convert personal popularity into congressional support for the president's legislative programs (and improve chances for reelection). It is not obvious, of course, why Congress should care about a president's popularity. After all, as we saw in Chapter 9, most members of Congress are secure in their seats, and few need fear any "party bosses" who might deny them renomination. Moreover, the president cannot ordinarily provide credible electoral rewards or penalties to members of Congress. President Franklin Roosevelt attempted to "purge" members of Congress who opposed his program by working for their defeat in the 1938 congressional election, but he failed. Nor does presidential support help a particular member of Congress. Most representatives win reelection anyway, and the few who are in trouble are rarely saved by presidential intervention. When President Reagan campaigned hard for Republican senatorial candidates in 1986, he, too, failed to have much impact.

That said, as we discussed in Chapter 9, congressional candidates do benefit from the president's coattails; when a popular president is at the top of the ticket, more of his party's candidates win their races for Congress. It is true, as can be seen from Figure 10-1, that a winning president will often find that his party's strength in Congress increases. Of course, as we also discussed in Chapter 9, other factors

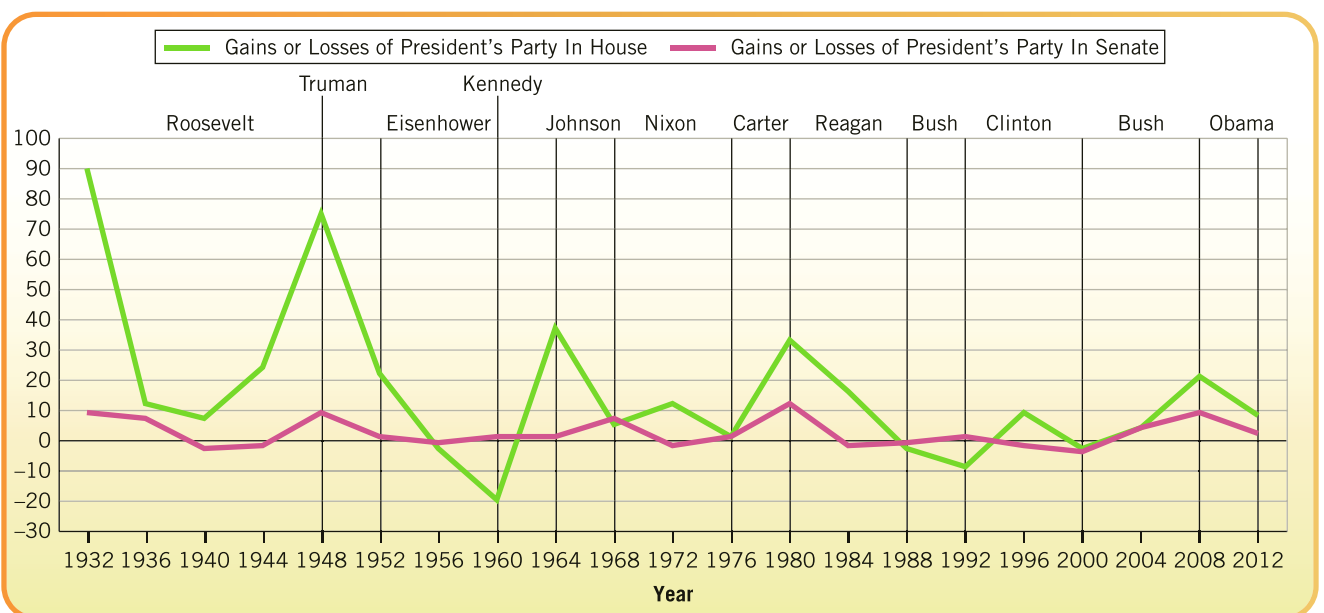
affect legislative elections as well, so presidential coattails are just one of several factors that matter there. While coattails exist, they are more modest than earlier studies suggested.

Nonetheless, a president's personal popularity may have a significant effect on how much of his program Congress passes, even if it does not affect the reelection chances of those members of Congress. Though they do not fear a president who threatens to campaign against them (or cherish one who promises to support them), members of Congress do have a sense that it is risky to oppose the policies of a popular president too adamantly. Politicians share a sense of a common fate; they tend to rise or fall together. Statistically, a president's popularity, as measured by the Gallup poll (see Figure 10-2), is associated with the proportion of his legislative proposals approved by Congress (see Figure 10-3). Other things equal, the more popular the president, the higher the proportion of his bills Congress will pass.

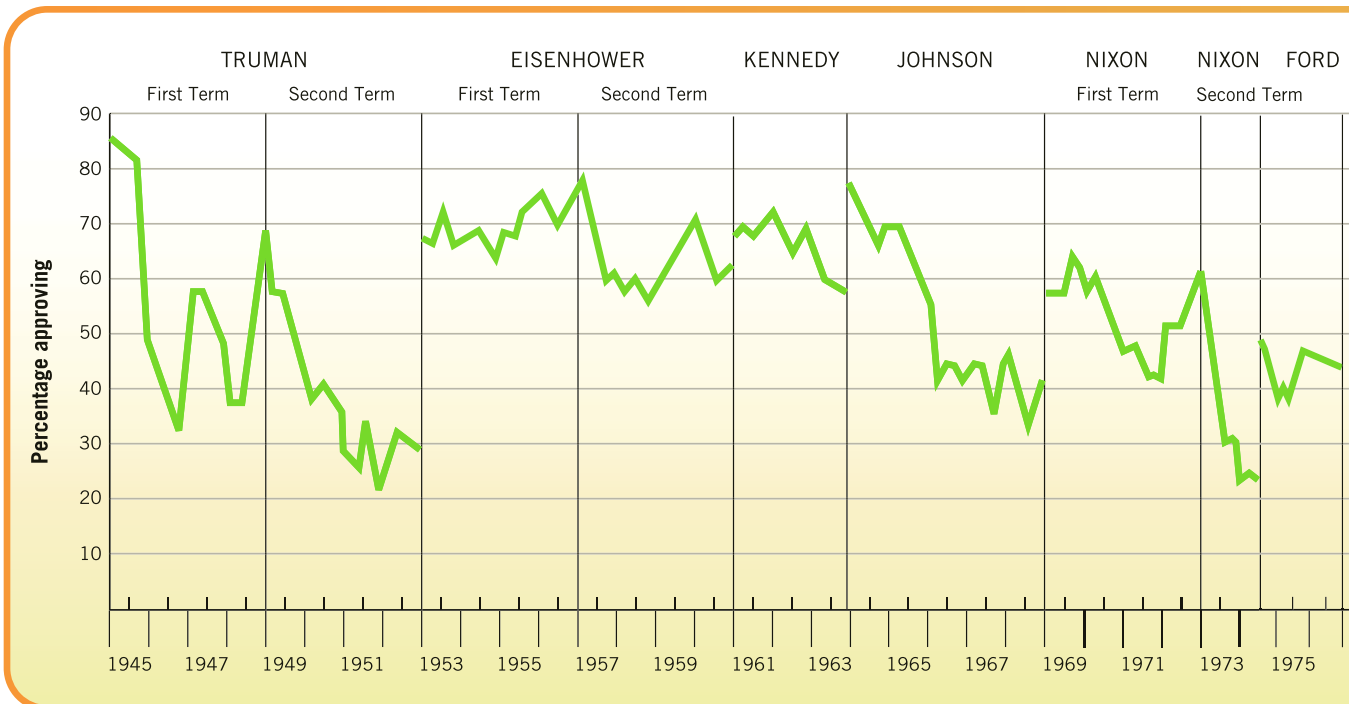
But use these figures with caution. How successful a president is with Congress depends not just on the numbers reported here, but on a lot of other factors. First, he can be "successful" on a big bill or on a trivial one. If he is successful on a lot of small matters and never on a big one, the measure of presidential victories does not tell us much. Second, a president can keep his victory score high by not taking a position on any controversial measure. (President Carter made his views known on only 22 percent of the House votes, while President Eisenhower made his views known on 56 percent of those votes.) Third, a president can

**bully pulpit** The president's use of his prestige and visibility to guide or enthuse the American public.

**FIGURE 10-1** Partisan Gains or Losses in Congress in Presidential Election Years



**Source:** Web sites of U.S. House of Representatives and U.S. Senate. **Note:** See the Web links on the front inside cover to visit the House and Senate websites.

**FIGURE 10-2** Presidential Popularity

**Note:** Popularity was measured by asking every few months, “Do you approve of the way \_\_\_\_\_ handling his job as president?”

**Source:** Thomas E. Cronin, *The State of the Presidency* (Boston: Little, Brown, 1975), 110–11. Updated with Gallup poll data, 1976 to present.

appear successful if a few bills he likes are passed, but most of his legislative program is bottled up in Congress and never comes to a vote. Given these problems, “presidential victories” are hard to measure accurately.

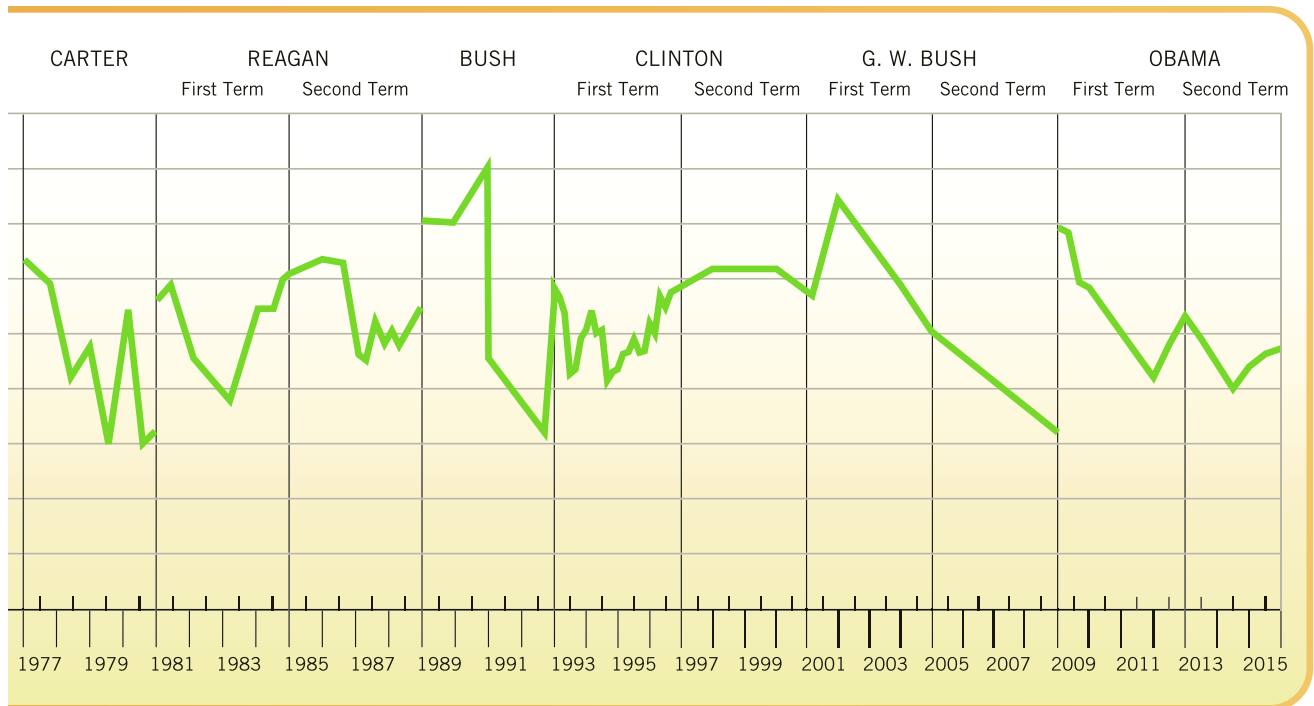
A fourth general caution: presidential popularity is hard to predict and can be influenced greatly by factors over which nobody, including the president, has much control. For example, when he took office in 2001, President George W. Bush’s approval rating was 57 percent, nearly identical to what President Bill Clinton received in his initial rating (58 percent) in 1993. But Bush also had the highest initial *disapproval* rating (25 percent) of any president since polling began. Undoubtedly, this was due partly to his becoming president on the heels of the Florida vote-count controversy. Bush’s approval ratings through his first six months were fairly typical for post-1960 presidents. But from the terrorist attack on the United States on September 11, 2001, through mid-2002, his approval ratings never dipped below 70 percent, and the approval ratings he received shortly after the attack (hovering around 90 percent) were the highest ever recorded. President Barack Obama’s approval rating averaged 63 percent in his first six months in office, but as unemployment neared 10 percent, his popularity decreased, falling below 45 percent by the 2010 midterm elections. In 2011 and 2012, Obama’s approval ratings typically averaged between 45 and 50 percent, and they were just above 50 percent when he won reelection. By the end of 2013, though, Obama’s approval rating had dropped to the low 40s, and they remained in the low-to-mid-40s through 2014 and 2015, moving slightly upward in 2016.

## The Decline in Popularity

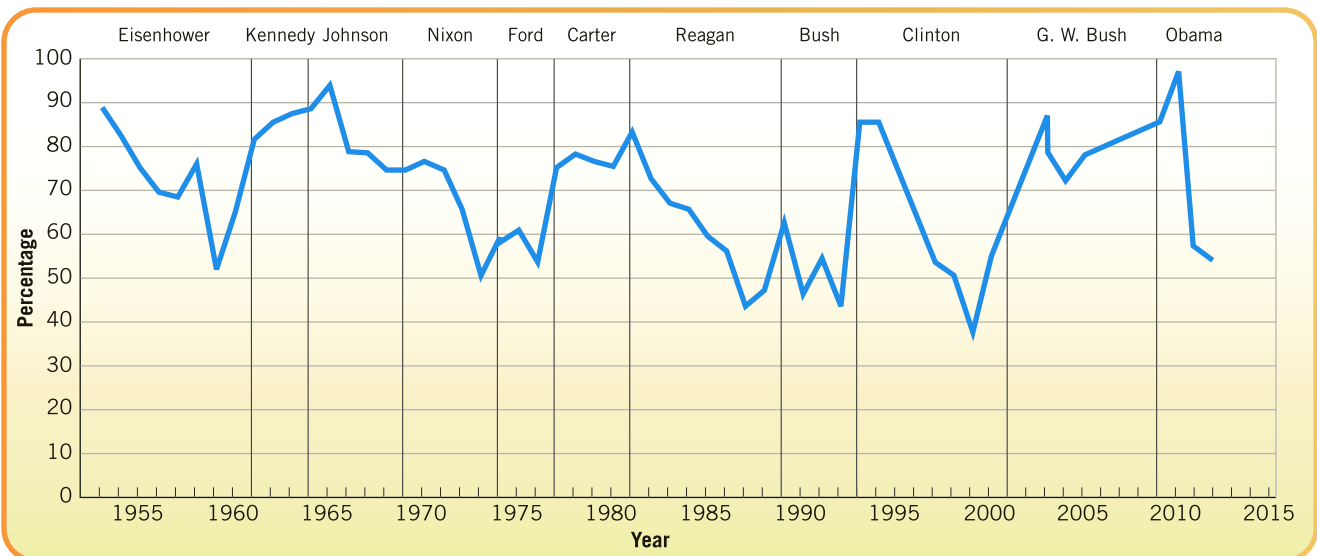
Though presidential popularity is an asset, its value tends inexorably to decline. As can be seen from Figure 10-2, every president except Eisenhower, Reagan, and Clinton lost popular support between his inauguration and the time that he left office, except when his reelection gave him a brief burst of renewed popularity. Truman was hurt by improprieties among his subordinates and by the protracted Korean War; Johnson was crippled by the increasing unpopularity of the Vietnam War; Nixon was severely damaged by the Watergate scandal; Ford was hurt by having pardoned Nixon for his part in Watergate; Carter was weakened by continuing inflation, staff irregularities, and the Iranian kidnapping of American hostages; George H. W. Bush was harmed by an economic recession, as was Barack Obama. George W. Bush suffered from public criticism of the war in Iraq.

Because a president’s popularity tends to be highest right after an election, political commentators like to speak of a “honeymoon,” during which, presumably, the president’s love affair with the people and with Congress can be consummated. Certainly, Roosevelt enjoyed such a honeymoon. In the legendary “first hundred days” of his presidency, from March to June 1933, FDR obtained from a willing Congress a vast array of new laws creating new agencies and authorizing new powers. But those were extraordinary times; the most serious economic depression of that century had put millions out of work, closed banks, impoverished farmers, and ruined the stock market. It would have been political suicide for Congress to have blocked, or





**FIGURE 10-3** Presidential Victories on Votes in Congress, 1953–2013



**Note:** Percentages indicate number of congressional votes supporting the president divided by the total number of votes on which the president has taken a position.

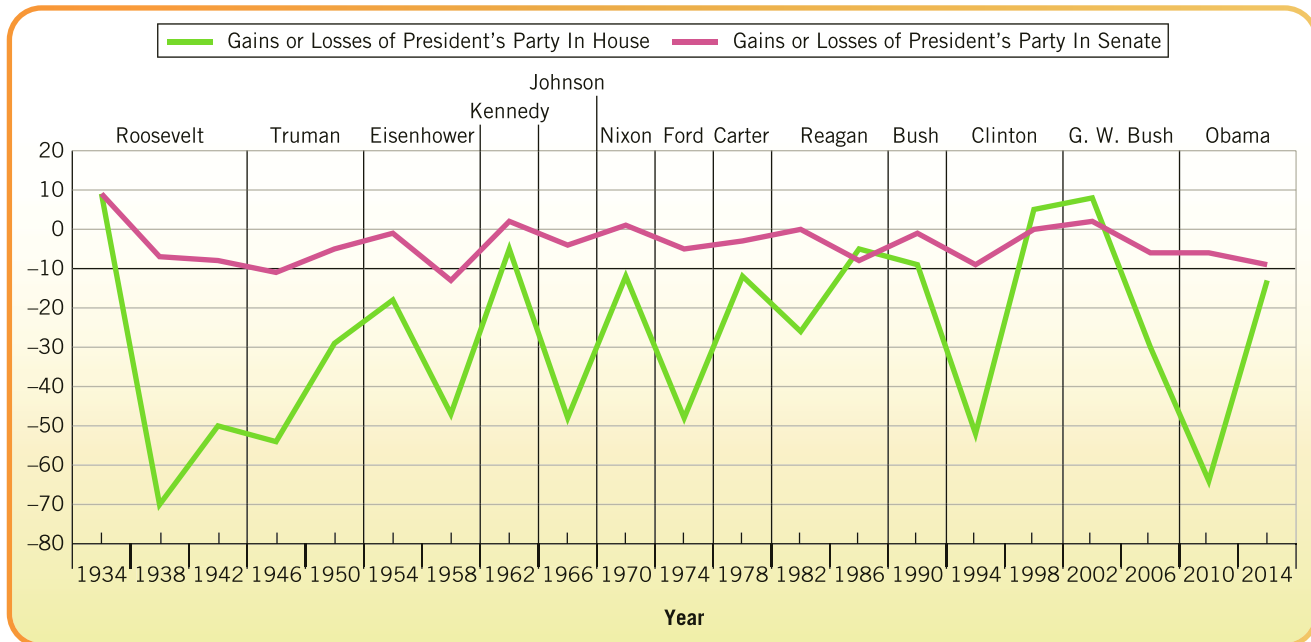
**Source:** The Brookings Institution, *Vital Statistics on Congress*, “Presidential Victories on Votes in Congress, 1953–2013.”

even delayed, action on measures that appeared designed to help the nation out of the crisis.

Other presidents, serving in more normal times, have not enjoyed such a honeymoon. Truman had little success with what he proposed; Eisenhower proposed little. Kennedy, Nixon, Ford, and Carter had some victories in their first year in office, but nothing that could be called a honeymoon. Only Lyndon Johnson enjoyed a highly productive relationship with

Congress; until the Vietnam War sapped his strength, he rarely lost. Reagan began his administration with important victories in his effort to cut expenditures and taxes, but in his second year in office he ran into trouble.

The decay in the reputation of the president and his party in midterm is evident in Figure 10-4. Since 1934, in every off-year election but two, the president’s party has lost seats in one or both chambers of Congress (see also the discussion

**FIGURE 10-4** Partisan Gains or Losses in Congress in Off-Year Elections

**Source:** Websites of U.S. House of Representatives and U.S. Senate. **Note:** See the Web links on the front inside cover to visit the House and Senate websites.

**veto message** A message from the president to Congress stating that he will not sign a bill it has passed. Must be produced within 10 days of the bill's passage.

**pocket veto** A bill fails to become law because the president did not sign it within 10 days before Congress adjourns.

**line-item veto** An executive's ability to block a particular provision in a bill passed by the legislature.

in Chapter 9 of the phenomenon of surge-and-decline). In 1998, the Democrats won five seats in the House and lost none in the Senate; in 2002, the Republicans gained eight House seats and two in the Senate. The ability of the president to persuade is important but limited. However, he also has a powerful bargaining chip to play: the ability to say no.

### The Power to Say No

The Constitution gives the president the power to veto legislation. In addition, most presidents have asserted the right of "executive privilege," or the right to withhold information that Congress may want to obtain from the president or his subordinates, and some

presidents have tried to impound funds appropriated by Congress. These efforts by the president to say no are not only a way of blocking action but also a way of forcing Congress to bargain with him over the substance of policies.

### Veto

If a president disapproves of a bill passed by both houses of Congress, he may veto it in one of two ways. One is by a **veto message**. This is a statement that the president

sends to Congress accompanying the bill, within 10 days (not counting Sundays) after the bill has been passed. In it he sets forth his reasons for not signing the bill. The other is the **pocket veto**. If the president does not sign the bill within 10 days and Congress has adjourned within that time, then the bill will not become law. Obviously, a pocket veto can be used only during a certain time of the year—just before Congress adjourns at the end of its second session. At times, however, presidents have pocket-vetoed a bill just before Congress recessed for a summer vacation or to permit its members to campaign during an off-year election. In 1972, Senator Edward M. Kennedy of Massachusetts protested that this was unconstitutional, since a recess is not the same thing as an adjournment. In a case brought to federal court, Kennedy was upheld, and it is now understood that the pocket veto can be used only just before the life of a given Congress expires.

A bill not signed or vetoed within 10 days while Congress is still in session becomes law automatically, without the president's approval. A bill returned to Congress with a veto message can be passed over the president's objections if at least two-thirds of each house votes to override the veto. A bill that has received a pocket veto cannot be brought back to life by Congress (since Congress has adjourned), nor does such a bill carry over to the next session of Congress. If Congress wants to press the matter, it will have to start all over again by passing the bill anew in its next session, and then hope the president will sign it—or, if he does not, that they can override his veto.

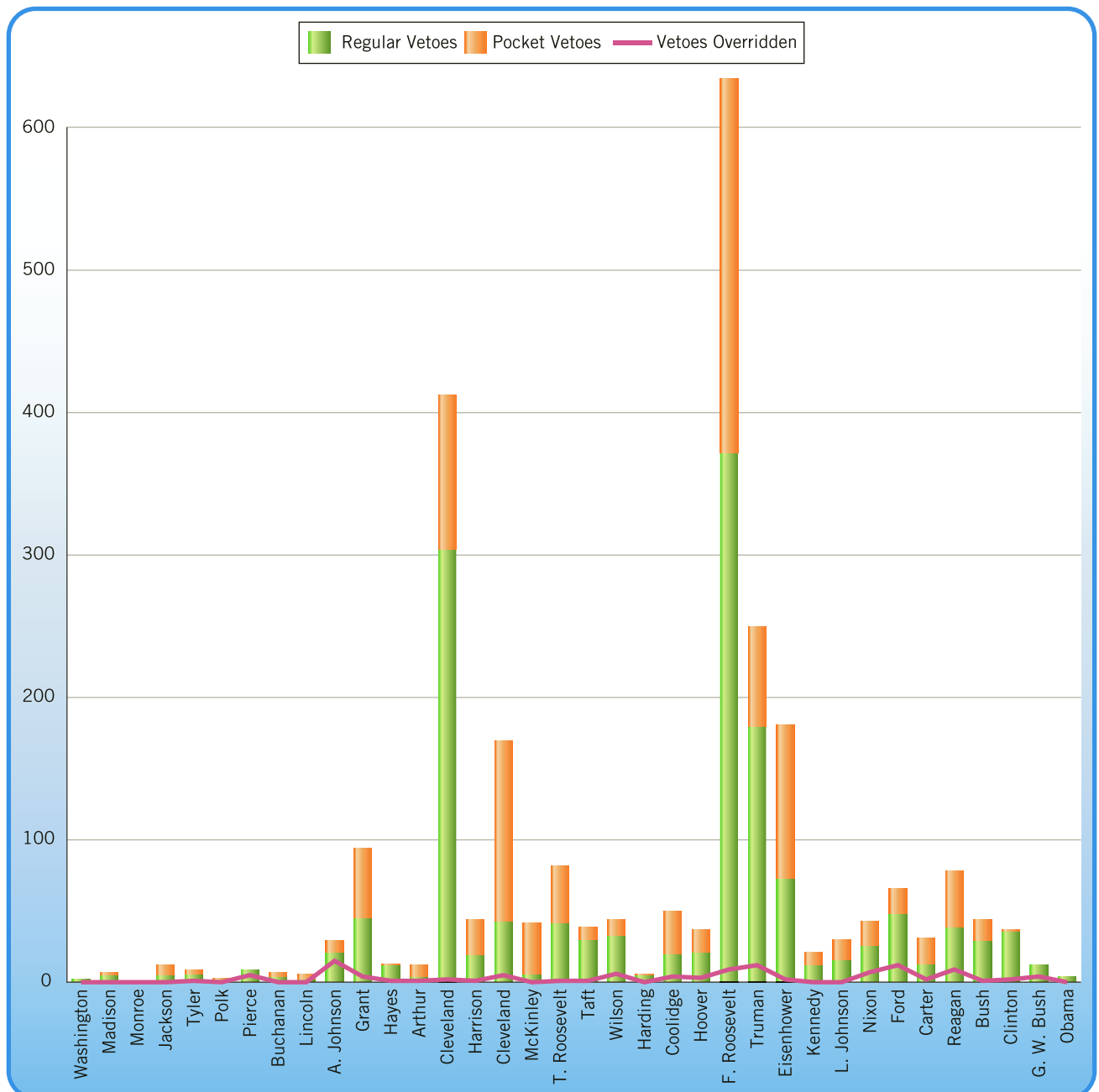
The president must either accept or reject the entire bill. Unlike most governors, presidents do not have the power to exercise a **line-item veto**, with which the chief executive can approve some provisions of a bill and disapprove

others. Congress could take advantage of this by putting items the president did not like into a bill he otherwise favored, forcing him to approve those provisions along with the rest of the bill or reject the whole thing. In 1996, Congress passed a bill, which the president signed into law, which gives the president the power of “enhanced rescission.” This means the president could cancel parts of a spending bill passed by Congress without vetoing the entire bill. The president had five days after signing a bill to send a message to Congress rescinding some parts of what he had signed. These rescissions would take effect unless Congress, by a two-thirds vote, overturned them. Congress

could choose which parts of the president’s cancellations it wanted to overturn. But the Supreme Court has decided that this law is unconstitutional. The Constitution gives the president no such power to carve up a bill; he must sign the whole bill, veto the whole bill, or allow it to become law without his signature.<sup>8</sup>

Nevertheless, the veto power is a substantial one, because Congress rarely has the votes to override it. From George Washington to Barack Obama, more than 2,500 presidential vetoes were cast; about 4 percent were overridden (see Figure 10-5). Cleveland, Franklin Roosevelt, Truman, and Eisenhower made the most extensive use of

**FIGURE 10-5** Presidential Vetoes, 1789–2015



**Source:** The American Presidency Project of the University of California at Santa Barbara.



vetoed, accounting for 65 percent of all vetoes ever cast. George W. Bush did not veto a single bill in his first term, though he issued 12 vetoes in his second term, of which four were overridden. In his first term in office, Barack Obama vetoed just two bills. Often the vetoed legislation is revised by Congress and passed in a form suitable to the president. There is no tally of how often this happens, but it is frequent enough for both branches of government to recognize that the veto, or even the threat of it, is part of an elaborate process of political negotiation in which the president has substantial powers.

## Executive Privilege

The Constitution says nothing about whether the president is obliged to divulge private communications between himself and his principal advisers, but presidents have acted as if they do have that privilege of confidentiality. The presidential claim is based on two grounds. First, the doctrine of the separation of powers means that one branch of government does not have the right to inquire into the internal workings of another branch headed by constitutionally named officers. Second, the principles of statecraft and of prudent administration require that the president have the right to obtain confidential and candid advice from subordinates; such advice could not be obtained if it would quickly be exposed to public scrutiny.

For almost 200 years, there was no serious challenge to the claim of presidential confidentiality. The Supreme Court did not require the disclosure of confidential communications to or from the president.<sup>9</sup> Congress was never happy with this claim, but until 1973 did not dispute it seriously. Indeed, in 1962, a Senate committee explicitly accepted a claim by President Kennedy that his secretary of defense, Robert S. McNamara, was not obliged to divulge the identity of Defense Department officials who had censored certain speeches by generals and admirals.

In 1974, the Supreme Court met the issue directly for the first time. A federal special prosecutor sought tape recordings of White House conversations between President Nixon and his advisers as part of his investigation of the Watergate scandal. In the case of *United States v. Nixon*, the Supreme Court held by a vote of eight to zero that while there may be a sound basis for the claim of executive privilege—especially where sensitive military or diplomatic matters are involved—there is no “absolute unqualified Presidential privilege of immunity from judicial process under all circumstances.”<sup>10</sup> To admit otherwise would be to block the constitutionally defined function of the federal courts to decide criminal cases.

Thus, Nixon was ordered to hand over the disputed tapes and papers to a federal judge, so that the judge could decide which were relevant to the case at hand and allow those to be introduced into evidence. In the future, another president may well persuade the Court that a different set of records or papers is so sensitive as to require protection, especially if there is no allegation of criminal misconduct requiring the production of evidence in court. As a practical

matter, it seems likely that except in unusual cases such as Watergate, presidential advisers will be able to continue to give private advice to the president.

In 1997 and 1998, President Clinton was sued while in office by a private person, Paula Jones, who claimed he had solicited sex from her in ways that hurt her reputation. In defending himself against that and other matters, his lawyers attempted to claim executive privilege for Secret Service officers and government-paid lawyers who worked with him; however, federal courts held that not only could a president be sued, but these other officials could not claim executive privilege.<sup>11</sup> One unhappy consequence of this episode is that the courts have greatly weakened the number of officials with whom the president can speak in confidence. It is not easy to run an organization when the courts can later compel your associates to testify about everything you said.

## Impoundment of Funds

From time to time, presidents have refused to spend money appropriated by Congress. Truman did not spend all that Congress wanted spent on the armed forces, and Johnson did not spend all that Congress made available for highway construction. Kennedy refused to spend money appropriated for new weapons systems that he did not like. Indeed, the precedent for impounding funds goes back at least to the administration of Thomas Jefferson.

But what has precedent is not thereby constitutional. The Constitution is silent on whether the president *must* spend the money that Congress appropriates; all it says is that the president cannot spend money that Congress has *not* appropriated. The major test of presidential power in this respect occurred during the Nixon administration. Nixon wished to reduce federal spending. He proposed in 1972 that Congress give him the power to reduce federal spending so that it would not exceed \$250 billion for the coming year. Congress, under Democratic control, refused. Nixon responded by pocket-vetoing 12 spending bills and then impounding funds appropriated under other laws that he had not vetoed.

Congress in turn responded by passing the Budget Reform Act of 1974—which, among other things, requires the president to spend all appropriated funds unless he first tells Congress what funds he wishes not to spend, and Congress, within 45 days, agrees to delete the items. If he wishes simply to delay spending the money, he need only inform Congress, but Congress then can refuse the delay by passing a resolution requiring the immediate release of the money. Federal courts have upheld the rule that the president must spend, without delay for policy reasons, money that Congress has appropriated.

## Signing Statements

Since at least the presidency of James Monroe, the White House has issued statements at the time the president signs a bill that has been passed by Congress. These statements have had several purposes: to express presidential attitudes

about the law, to tell the executive branch how to implement it, or to declare that the president thinks some part of the law is unconstitutional. President Andrew Jackson, for example, issued a statement in 1830 saying that a law designed to build a road from Chicago to Detroit should not cross the Michigan boundary (and so not get to Chicago). Congress complained, but Jackson's view prevailed and the road did not get to Chicago.

In the 20th century, these statements became common. President Reagan issued 71, President George H. W. Bush signed 141, and President Clinton inked 105. By the late 1980s, they were published in legal documents as part of the legislative history of a bill.<sup>12</sup> During his two terms, President George W. Bush signed more than 150, and in so doing, he challenged more than 1,200 sections of legislation—about double the number challenged by all of his predecessors. From 2009 until 2014, President Obama (who campaigned against the use of signing statements) signed more than two dozen.<sup>13</sup>

Naturally, members of Congress are upset by this practice. To them, a **signing statement** often blocks the enforcement of a law Congress has passed and so is equivalent to an unconstitutional line-item veto. But presidential advisers have defended these documents, arguing (as did an assistant attorney general in the Clinton administration) that they not only clarify how the law should be implemented but also allow the president to declare what part of the law is, in his view, unconstitutional and thus ought not to be enforced at all.<sup>14</sup>

While the Supreme Court has allowed signing statements to clarify the unclear legislative intent of a law, it has never given a clear verdict about the constitutional significance of such documents.<sup>15</sup> By 2007, the Democratic Congress was considering a challenge to the practice; President Barack Obama issued a memo less than three months after

taking office stating that he would use signing statements only to protest unconstitutional provisions on legislation, not for policy disagreements. But even with unified government, President Obama issued signing statements during his first

year in office, and members of Congress criticized him for doing so. The conflict over signing statements is another illustration of what one scholar has called the “invitation to struggle” created by the Constitution between the president and Congress.<sup>16</sup>

**signing statement** A presidential document that reveals what the president thinks of a new law and how it ought to be enforced.

## 10-4 The Office of the President

It was not until 1857 that the president was allowed to have a private secretary paid for with public funds, and it was not until after the assassination of President McKinley in 1901 that the president was given a Secret Service bodyguard. The president was not able to submit a single presidential budget until after 1921, when the Budget and Accounting Act was passed and the Bureau of the Budget (now called the Office of Management and Budget) was created. Grover Cleveland personally answered the White House telephone, and Abraham Lincoln often answered his own mail.

Today, of course, the president has hundreds of people assisting him, and the trappings of power—helicopters, guards, limousines—are plainly visible. The White House staff has grown enormously. (Just how big the staff is, no one knows. Presidents like to pretend that the White House is not the large bureaucracy that it in fact has become.) Add to this the opportunities for presidential appointments to the cabinet, the courts, and various agencies, and the resources at the disposal of the president would appear to be awesome. That conclusion is partly true and partly false, or at least misleading, and for a simple reason. If the president was once helpless for lack of assistance, he now confronts an army of assistants so large that it constitutes a bureaucracy he has difficulty controlling.

### The White House Office

The president's closest assistants have offices in the White House, usually in the West Wing of the building. Their titles often do not reveal the functions that they actually perform: “counsel,” “counselor,” “assistant to the president,” “special assistant,” “special consultant,” and so forth. The actual titles vary from one administration to another, but in general the men and women who hold them oversee the political and policy interests of the president. As part of the president's personal staff, these aides do not have to be confirmed by the Senate; the president can hire and fire them at will. As of 2013, the Obama White House had approximately 460 staff members.<sup>17</sup>

There are essentially three ways in which a president can organize his personal staff: through the “pyramid,” “circular,”



## LANDMARK CASES

### Powers of the President

- **United States v. Nixon (1974):** Though the president is entitled to receive confidential advice, he can be required to reveal material related to a criminal prosecution.
- **Nixon v. Fitzgerald (1982):** The president may not be sued while in office.
- **Clinton v. Jones (1997):** The president may be sued for actions taken before he became president.
- **United States v. Texas (2016):** With a 4–4 tie (due to a vacancy on the Court), the Supreme Court could not decide whether President Obama's 2014 executive action granting temporary legal status to certain groups of illegal immigrants was constitutional, thereby leaving in place an appeals court ruling blocking the program.

**pyramid structure**

A president's subordinates report to him through a clear chain of command headed by a chief of staff.

**circular structure**

Several of the president's assistants report directly to him.

**ad hoc structure**

Several subordinates, cabinet officers, and committees report directly to the president on different matters.

and "ad hoc" methods. In a **pyramid structure**, used by Eisenhower, Nixon, Reagan, both Presidents Bush, and (after a while) Clinton, most assistants report through a hierarchy to a chief of staff, who then deals with the president directly. In a **circular structure**, used by Carter, cabinet secretaries and assistants report directly to the president. In an **ad hoc structure**, used for a while by President Clinton, task forces, committees, and informal groups of friends and advisers deal directly with the president. For example, the Clinton administration's health care policy planning was spearheaded not by Health and Human Services secretary

Donna E. Shalala, but by First Lady Hillary Rodham Clinton and a White House adviser, Ira Magaziner. Likewise, its initiative to reform the federal bureaucracy (the National Performance Review) was led not by Office of Management and Budget director Leon E. Panetta, but by an adviser to Vice President Gore, Elaine Kamarck.<sup>18</sup>

It is common for presidents to mix methods. For example, Franklin Roosevelt alternated between the circular and ad hoc methods in the conduct of his domestic policy and sometimes employed a pyramid structure when dealing with foreign affairs and military policy.

Taken individually, each method of organization has advantages and disadvantages. A pyramid structure provides for an orderly flow of information and decisions, but does so at the risk of isolating or misinforming the president. The circular method has the virtue of giving the president a great deal of information, but at the price of confusion and conflict among cabinet secretaries and assistants. An ad hoc structure allows great flexibility, minimizes bureaucratic inertia, and generates ideas and information from disparate channels, but it risks cutting the president off from the government officials who are ultimately responsible for translating presidential decisions into policy proposals and administrative action.

All presidents claim they are open to many sources of advice, and some presidents try to guarantee that openness by using the circular method of staff organization. President Carter liked to describe his office as a wheel, with himself as the hub and his several assistants as spokes. But most presidents discover, as did Carter, that the difficulty of managing the large White House bureaucracy and of conserving their own limited supply of time and energy makes it necessary for them to rely heavily on one or two key subordinates. Carter, in July 1979, dramatically altered the White House staff organization by elevating Hamilton Jordan to the post of chief of staff, with the job of coordinating the work of the other staff assistants.

At first, President Reagan adopted a compromise between the circle and the pyramid, putting the White House under the direction of three key aides. At the beginning of his second term in 1985, however, the president shifted to a pyramid, placing all his assistants under a single chief of staff. Clinton began with an ad hoc system and then changed to one more like a pyramid. Of course, each assistant has others working for him or her, sometimes a large number. At a slightly lower level of status, there are "special assistants to the president" for various purposes. (Being "special" means, paradoxically, being less important.)

Typically, senior White House staff members are drawn from the ranks of the president's campaign staff—longtime associates in whom he has confidence. A few members, however, will be experts brought in after the campaign; such was the case with Henry Kissinger, a former Harvard professor who became President Nixon's assistant for national security affairs. The offices these men and women occupy often are small and crowded (Kissinger's was not much bigger than the one he had while a professor at Harvard); but their occupants put up with any discomfort willingly in exchange for the privilege (and the power) of being *in* the White House. The arrangement of offices—their size, and especially their proximity to the president's Oval Office—is a good measure of the relative influence of the people in them.

## The Executive Office of the President

Agencies in the Executive Office report directly to the president and perform staff services, but are not located in the White House itself. Their members may or may not enjoy intimate contact with the president; some agencies are rather large bureaucracies. The top positions in these organizations are filled by presidential appointment, but unlike the White House staff positions, these appointments must be confirmed by the Senate.

The principal agencies in the Executive Office are:

- Council of Economic Advisers (CEA)
- Director of National Intelligence (DNI)
- National Security Council
- Office of Management and Budget (OMB)
- Office of the U.S. Trade Representative
- Office of the Vice President

Of all the agencies in the Executive Office of the President, perhaps the most important in terms of the president's need for assistance in administering the federal government is the Office of Management and Budget. First called the Bureau of the Budget when it was created in 1921, it became OMB in 1970 to reflect its broader responsibilities. Today it does considerably more than assemble and analyze the figures that go each year into the national budget the president submits to Congress. It also studies the organization and operations of the executive branch, devises plans for reorganizing various departments and agencies, develops ways of getting better information about government programs, and reviews proposals that cabinet departments want included in the president's legislative program.

## The Cabinet

The **cabinet** is a product of tradition and hope. At one time, the heads of the federal departments met regularly with the president to discuss matters, and some people, especially those critical of strong presidents, would like to see this kind of collegial decision making reestablished. But in fact this role of the cabinet is largely fiction. Indeed, the Constitution does not even mention the cabinet (though the Twenty-fifth Amendment implicitly defines it as consisting of “the principal offices of the executive departments”). When Washington tried to get his cabinet to work together, its two strongest members—Alexander Hamilton and Thomas Jefferson—spent most of their time feuding. The cabinet, as a presidential committee, did not work any better for John Adams or Abraham Lincoln, for Franklin Roosevelt or John Kennedy. Dwight Eisenhower is almost the only modern president who came close to making the cabinet a truly deliberative body; he gave it a large staff, held regular meetings, and listened to opinions expressed there. But even under Eisenhower, the cabinet did not have much influence over presidential decisions, nor did it help him gain more power over the government.

By custom, cabinet officers are the heads of the 15 major executive departments. These departments, together with the dates of their creation and the approximate number of their employees, are given in Table 10-1. The order of their creation is unimportant except in terms of protocol; where one sits at cabinet meetings is determined by the age of the department that one heads. Thus, the secretary of state sits next to the president on one side and the secretary of the treasury next to him on the other. Down at the foot of the table are the heads of the newer departments.

## Independent Agencies, Commissions, and Judgeships

The president also appoints people to four dozen or so agencies and commissions that are not considered part of the cabinet and that by law often have a quasi-independent status. The difference between an “executive” and an “independent” agency is not precise. In general, it means the heads of executive agencies serve at the pleasure of the president and can be removed at his discretion. On the other hand, the heads of many independent agencies serve for fixed terms of office and can be removed only “for cause.”

The president can also appoint federal judges, subject to the consent of the Senate. Judges serve for life unless they are removed by impeachment and conviction. The reason for the special barriers to the removal of judges is that they represent an independent branch of government as defined by the Constitution, and limits on presidential removal powers are necessary to preserve that independence.

## Who Gets Appointed

As we have seen, a president can make a lot of appointments but rarely knows more than a few of the appointees.

**TABLE 10-1** The Cabinet Departments

Department	created	Approximate Employment (2015)
State	1789	30,000*
Treasury	1789	100,000
Defense <sup>a</sup>	1947	700,000
Justice	1789	(est.) 117,000
Interior	1849	70,000
Agriculture <sup>b</sup>	1889	100,000
Commerce	1913	38,000
Labor	1913	15,000
Health and Human Services <sup>c</sup>	1953	65,000
Housing and Urban Development	1965	9,000
Transportation	1966	55,000
Energy	1977	(2013) 15,000
Education	1979	4,200
Veterans Affairs	1989	235,000
Homeland Security	2002	216,000

\*Formerly the War Department, created in 1789. Figures are for civilians only.

<sup>b</sup>Agriculture Department created in 1862; made part of cabinet in 1889.

<sup>c</sup>Originally Health, Education and Welfare; reorganized in 1979.

**Note:** Figure for Justice Department comes from Office of Management and Budget, “The President’s Budget for Fiscal Year 2016: Historical Tables,” as White House website does not provide estimate. Figure for Department of Energy comes from Office of Personnel Management, “Federal Employment Reports: Employments and Trends—March 2013,” as White House website lists full-time and contract employees.

**Source:** White House website, “Our Government: The Executive Branch.” **Note:** See the Web links on the front inside cover to visit the White House website.

Unlike cabinet members in a parliamentary system, the president’s cabinet officers and their principal deputies usually have not served with the chief executive in the legislature. Instead, they come

from private business, universities, think tanks, foundations, law firms, labor unions, and the ranks of former and present members of Congress as well as past state and local government officials. A president is fortunate to have agreement from most cabinet members on major policy questions. President Reagan made a special effort to ensure that his cabinet members were ideologically in tune with him, but even so Secretary of State Alexander Haig soon got into a series of quarrels with senior members of the White House staff and had to resign.

**cabinet** The heads of the 15 executive branch departments of the federal government.





Keystone-France/Gamma-Keystone/Getty Images



Chip Somodevilla/Getty Images

**IMAGE 10-3** Secretary of Labor Frances Perkins (left), appointed by President Franklin Roosevelt, was the first woman cabinet member. When Condoleezza Rice was selected by President George W. Bush to be National Security Advisor, she became the first woman to hold that position (and later the first African American woman to be Secretary of State).

The men and women appointed to the cabinet and to the subcabinet\* usually will have had some prior federal experience. One study of more than a thousand such appointments made by five presidents (Franklin Roosevelt through Lyndon Johnson) found that about 85 percent of the cabinet, subcabinet, and independent-agency appointees had some prior federal experience. In fact, most were in government service (at the federal, state, or local levels) just before they received their cabinet or subcabinet appointment.<sup>19</sup> Clearly, the executive branch is not, in general, run by novices.

Many of these appointees are what Richard Neustadt has called “in-and-outers”: people who alternate between jobs in the federal government and jobs in the private sector, especially in law firms and in universities. Donald Rumsfeld, before becoming secretary of defense to President George W. Bush, had been secretary of defense and chief of staff under President Ford and before that a member of Congress. Between his Ford and Bush services, he was an executive in a large pharmaceutical company. This pattern is quite different from that of parliamentary systems, where all the cabinet officers come from the legislature and typically are full-time career politicians.

## The President’s Program

Imagine you have just spent three or four years running for president, during which time you have given essentially the same speech over and over again. You have had no time to study the issues in any depth. To reach a large television

audience, you have couched your ideas largely in rather simple—if not simple-minded—slogans. Your principal advisers are political aides, not legislative specialists.

You win. You are inaugurated. Now you must be a president instead of just talking about it. You must fill hundreds of appointive posts, but you know personally only a handful of the candidates. You must deliver a state of the union message to Congress only two or three weeks after you are sworn in. It is quite possible you have never read, much less written, such a message before. You must submit a new budget; the old one is hundreds of pages long, much of it comprehensible only to experts. Foreign governments, as well as the stock market, hang on your every word, interpreting many of your remarks in ways that totally surprise you. What will you do?

The Constitution is not much help. It directs you to report on the state of the union and to recommend “such measures” as you shall judge “necessary and expedient.” Beyond that, you are charged to “take care that the laws be faithfully executed.”

At one time, of course, the demands placed on a newly elected president were not very great because the president was not expected to do very much. The president, on assuming office, might speak of the tariff, or relations with England, or the value of veterans’ pensions, or the need for civil service reform. The president was not expected to have something to say (and offer) to everybody, but is expected to do so today.

There are essentially two ways for a president to develop a program. One, exemplified by Presidents Carter and Clinton, is to have a policy on almost everything. To do this, they worked endless hours and studied countless documents,

\*Subcabinet refers to undersecretary, deputy secretary, and assistant secretaries in each cabinet department.

trying to learn something about and then state their positions on, a large number of issues. The other method, illustrated by President Reagan, is to concentrate on three or four major initiatives or themes and leave everything else to subordinates.

But even when a president has a governing philosophy, as did Reagan, he cannot risk plunging ahead on his own. He must judge public and congressional reaction to this program before he commits himself fully to it. Therefore, he often will allow parts of his program to be “leaked” to the press, or “floated” as a trial balloon. Reagan’s commitment to a 30 percent tax cut and larger military expenditures was so well known that it required no leaking, but he did have to float his ideas on Social Security and certain budget cuts to test popular reaction. His opponents in the bureaucracy did exactly the same thing, hoping for the opposite effect. They leaked controversial parts of the program in an effort to discredit the whole policy. This process of testing the winds by a president and his critics helps explain why so many news stories coming from Washington mention no person by name but only an anonymous “highly placed source.”

In addition to the risks of adverse reaction, the president faces three other constraints on his ability to plan a program. One is the sheer limit of his time and attention span. Every president works harder than he has ever worked before. A 90-hour week is typical. Even so, he has great difficulty keeping up with all the things he is supposed to know and make decisions about. For example, during an average year Congress passes between 400 and 600 bills, each of which the president must sign, veto, or allow to take effect without his signature. Scores of people wish to see him. Hundreds of phone calls must be made to members

of Congress and others in order to ask for help, to smooth ruffled feathers, or to get information. He must receive all newly appointed ambassadors and visiting heads of state; he must have his picture taken with countless people, from a Nobel Prize winner to a child whose likeness will appear on the Easter Seal.

The second constraint is the unexpected crisis. Franklin Roosevelt obviously had to respond to a depression and to the mounting risks of world war. But most presidents encounter their crises when they least expect them.

The third constraint is that the federal government and most federal programs, as well as the federal budget, can be changed only marginally, except in special circumstances. The vast bulk of federal expenditures are beyond control in any given year; the money must be spent whether the president likes it or not. Many federal programs have such strong congressional or public support that they must be left intact or modified only slightly. And this means that most federal employees can count on job security, whatever a president’s views on reducing the bureaucracy.

The result of these constraints is that the president, at least in ordinary times, has to be selective about what he wants. In a sense, he has a stock of influence and prestige the way that he might have a supply of money. If he wants to get the most “return” on his resources, he must “invest” that influence and prestige carefully in enterprises that promise substantial gains—in public benefits and political support—at reasonable costs. Each president tends to speak in terms of changing everything at once, calling his approach a “New Deal,” a “New Frontier,” a “Great Society,” or the “New Federalism.” But beneath the rhetoric, he must identify a few specific proposals on which he wishes to bet his resources—while keeping in mind the need to reserve a



New York Times Co/Archive Photos/Getty Images

**IMAGE 10-4** A group of Civilian Conservation Corps workers hired by the government during the Great Depression.

substantial stock of resources to handle the inevitable crises and emergencies. In recent decades, events have required every president to devote much of his time and resources to two key issues: the state of the economy and foreign affairs. What he manages to do beyond this will depend on his personal views and his sense of what the nation, as well as his reelection, requires.

## 10-5 Presidential Transition

No president but Franklin Roosevelt has ever served more than two terms, and since the ratification of the Twenty-second Amendment in 1951, no president will ever again have the chance. But more than tradition or the Constitution escorts presidents from office. Only about one-third of the presidents since George Washington have been elected to a second term. Of the 27 not reelected, four died in office during their first term. But the remainder either did not seek or, more usually, could not obtain reelection.

Of the eight presidents who died in office, four were assassinated: Lincoln, Garfield, McKinley, and Kennedy. At least six other presidents were the objects of unsuccessful assassination attempts: Jackson, Theodore Roosevelt, Franklin Roosevelt, Truman, Ford, and Reagan. (There may have been attempts on other presidents that never came to public notice; the attempts mentioned here involved public efforts to fire weapons at presidents.)

The presidents who served two or more terms fall into certain periods, such as the Founding (Washington, Jefferson, Madison, Monroe) or wartime (Lincoln, Wilson, Roosevelt), or they happened to be in office during especially tranquil times (Monroe, McKinley, Eisenhower, Clinton), or some combination of the above. When the country was divided deeply, as during the years just before the Civil War and during the period of Reconstruction after it, it was the rare president who was reelected.



Michael Evans/The White House/National Archives and Records Administration

**IMAGE 10-5** President Reagan, moments before he was shot on March 30, 1981, by a would-be assassin. The Twenty-fifth Amendment solves the problem of presidential disability by providing for an orderly transfer of power to the vice president.

## The Vice President

Eight times a vice president has become president because of the death of his predecessor. It first happened to John Tyler, who became president in 1841 when William Henry Harrison died peacefully after only one month in office. The question for Tyler and for the country was substantial: Was Tyler simply to be the acting president and a kind of caretaker until a new president was elected, or was he to be *president* in every sense of the word? Despite criticism and despite what might have been the contrary intention of the Framers of the Constitution, Tyler decided on the latter course and was confirmed in that opinion by a decision of Congress. Ever since, the vice president has become president automatically, in title and in powers, when the occupant of the White House has died or resigned.

But if vice presidents frequently acquire office because of death, they rarely acquire it by election. Since the earliest period of the Founding—when John Adams and Thomas Jefferson each were elected president after having first served as vice president under their predecessors—there have been only three occasions when a vice president later was able to win the presidency without his president's having died in office. One was in 1836, when Martin Van Buren was elected president after having served as Andrew Jackson's vice president; the second was in 1968, when Richard Nixon became president after having served as Dwight Eisenhower's vice president eight years earlier; the third was in 1988, when George Bush succeeded Ronald Reagan. Many vice presidents who entered the Oval Office because their predecessors died were elected subsequently to terms in their own right: Theodore Roosevelt, Calvin Coolidge, Harry Truman, and Lyndon Johnson. But no one who wishes to become president should assume that to become vice president first is the best way to get there.

The vice-presidency is just what so many vice presidents have complained about: a rather empty job. John Adams described it as “the most insignificant office that ever the invention of man contrived or his imagination conceived,” and most of his successors would have agreed. Thomas Jefferson, almost alone, had a good word to say for it: “The second office of the government is honorable and easy, the first is but a splendid misery.”<sup>20</sup> Daniel Webster rejected a vice-presidential nomination in 1848 with the phrase, “I do not choose to be buried until I am really dead.”<sup>21</sup> (Had he taken the job, he would have become president after Zachary Taylor died in office, thereby achieving a remarkable secular resurrection.) For all the good and bad jokes about the vice-presidency, however, candidates still struggle for it mightily. John Nance Garner gave up the speakership of the House to become Franklin Roosevelt's vice president (a job he later cuttingly valued as “not worth a pitcher of warm spit”<sup>†</sup>), and Lyndon Johnson gave up the majority leadership of the Senate to become Kennedy's. Truman, Nixon, Humphrey, Mondale, and Gore all left reasonably secure Senate seats for the vice-presidency.

<sup>†</sup>The word he actually used was a good deal stronger than *spit*, but historians are decorous.



The only official task of the vice president is to preside over the Senate and to vote in case of a tie. Even this is scarcely time-consuming, as the Senate chooses from among its members a president *pro tempore*, as required by the Constitution, who (along with others) presides in the absence of the vice president. The vice president's leadership powers in the Senate are weak, especially when the vice president is of a different party from the majority of the senators. But on occasion the vice president can become very important. Right after terrorists attacked the United States in 2001, President Bush was in his airplane while his advisers worried that he might be attacked next. Vice President Cheney was hidden away quickly in a secret, secure location so he could run the government if anything happened to President Bush. And for many months thereafter, Cheney stayed in this location in case he suddenly became president. But absent a crisis, the vice president is, at best, only an adviser to the president.

## Problems of Succession

If the president should die in office, the right of the vice president to assume that office has been clear since the time of John Tyler. But two questions remain: What if the president falls seriously ill, but does not die? And if the vice president steps up, who then becomes the new vice president?

The first problem has arisen on a number of occasions. After President James A. Garfield was shot in 1881, he lingered through the summer before he died. President Woodrow Wilson collapsed from a stroke in 1919, became a virtual recluse for several months, and then sharply curtailed activity for the rest of his term. Eisenhower had three serious illnesses while in office; Reagan was shot during his first term and hospitalized during his second.

The second problem has arisen on eight occasions when the vice president became president owing to the death of the incumbent. In these cases, no elected person was available to succeed the new president, should he die in office. For many decades, the problem was handled by law. The Succession Act of 1886, for example, designated the secretary of state as next in line for the presidency should the vice president die, followed by the other cabinet officers in order of seniority. But this meant that a vice president who became president could pick his own successor by choosing his own secretary of state. In 1947, the law was changed to make the Speaker of the House and then the president *pro tempore* of the Senate next in line for the presidency. But that created still other problems: a Speaker or a president *pro tempore* is likely to be chosen because of seniority, not executive skill, and in any event might well be of the party opposite to that occupying the White House.

Both problems were addressed in 1967 by the Twenty-fifth Amendment to the Constitution. It deals with the disability problem by allowing the vice president to serve as “acting president” whenever the president declares he is unable to discharge the powers and duties of his office, or whenever the vice president and a majority of the cabinet declare that the president is incapacitated. If the president disagrees with the opinion of his vice president and a majority of the cabinet, then Congress decides the issue. A two-thirds majority

is necessary to confirm that the president is unable to serve.

The amendment deals with the succession problem by requiring a vice president who assumes the presidency (after a vacancy is created by death or resignation) to nominate a new vice president. This person takes office if the nomination is confirmed by a majority vote of both houses of Congress. When there is no vice president, then the 1947 law governs: next in line are the Speaker, the Senate president, and the 15 cabinet officers, beginning with the secretary of state.

The disability problem has not arisen since the adoption of the amendment, but the succession problem has. In 1973, Vice President Spiro Agnew resigned, having pleaded no contest to criminal charges. President Nixon nominated Gerald Ford as vice president, and after extensive hearings he was confirmed by both houses of Congress and sworn in. Then on August 9, 1974, Nixon resigned the presidency—the only president to do so—and Ford became president. He nominated as his vice president Nelson Rockefeller, who was confirmed by both houses of Congress—again, after extensive hearings—and was sworn in on December 19, 1974. For the first time in history, the nation had as its two principal executive officers men who had not been elected to either the presidency or the vice-presidency. It is a measure of the legitimacy of the Constitution that this arrangement caused no crisis in public opinion.

## Impeachment

There is one other way besides death, disability, or resignation by which a president can leave office before his term expires: impeachment. Not only the president and vice president, but also all “civil officers of the United States” can be removed by being impeached and convicted. As a practical matter, civil officers—cabinet secretaries, bureau chiefs, and the like—are not subject to impeachment because the president can remove them at any time, and usually will if their behavior makes them a serious political liability. Federal judges, who serve during “good behavior”<sup>†</sup> and who are constitutionally independent of the president and Congress, have been the most frequent objects of impeachment.

An **impeachment** is like an indictment in a criminal trial: a set of charges against somebody, voted by (in this case) the House of Representatives. To be removed from office, the impeached officer must be convicted by a two-thirds vote of the Senate—which sits as a court, is presided over by the Chief Justice, hears the evidence, and makes its decision under whatever rules it wishes to adopt. Nineteen persons have been impeached by the House, and eight have been convicted by the Senate. The last conviction was in 2010, when a federal judge was removed from office.

Only two presidents have ever been impeached—Andrew Johnson in 1868 and Bill Clinton in 1998. Richard

**impeachment**  
Charges against a president approved by a majority of the House of Representatives.

<sup>†</sup>“Good behavior” means a judge can stay in office until he retires or dies, unless he or she is impeached and convicted.



Nixon surely would have been impeached in 1974, had he not resigned after the House Judiciary Committee voted to recommend impeachment.

The Senate did not convict either Johnson or Clinton by the necessary two-thirds vote. The case against Johnson was entirely political. Radical Republicans, who wished to punish the South after the Civil War, were angry at Johnson, a Southerner, who had a soft policy toward the South. The argument against him was flimsy.

The case against Clinton was more serious. The House Judiciary Committee, relying on the report of independent counsel Kenneth Starr, charged Clinton with perjury (lying under oath about his sexual affair with aide Monica Lewinsky), obstruction of justice (trying to block the Starr investigation), and abuse of power (making false written statements to the Judiciary Committee). The vote to impeach was passed by the House along party lines. The Senate vote fell far short of the two-thirds required for conviction.

Why did Clinton survive? There were many factors. The public disliked his private behavior, but did not think it amounted to an impeachable offense. (In fact, right after Lewinsky revealed her sexual affair with him, his standing in opinion polls went up.) The economy was strong, and the nation was at peace. Clinton was a centrist Democrat who did not offend most voters.

The one casualty of the entire episode was the death of the law that had created the office of the Independent Counsel. Passed in 1978 by a Congress that was upset by the Watergate crisis, the law directed the attorney general to ask a three-judge panel to appoint an independent counsel whenever a high official is charged with serious misconduct. (In 1993, when the 1978 law expired, President Clinton asked that it be passed again. It was.) Eighteen people were investigated by various independent counsels from 1978 to 1999. In about half the cases, no charges were brought to court.

For a long time, Republicans disliked the law because the counsels were investigating them. After Clinton came to office, the counsels started investigating him and his associates, and so the Democrats began to oppose it. In 1999, when the law expired, it was not renewed.

A problem remains, however. How will any high official, including the president, be investigated when the attorney general, who does most investigations, is part of the president's team? One answer is to let Congress do it, but Congress may be controlled by the president's party. No one has yet solved this puzzle.

Some Founders may have thought that impeachment would be used frequently against presidents, but as a practical matter it is so complex and serious an undertaking that in the future, we can probably expect it will be reserved only for the gravest forms of presidential misconduct. No one quite knows what a high crime or misdemeanor is, but most scholars agree that the charge must involve something illegal

or unconstitutional, not just unpopular. Unless a president or vice president is first impeached and convicted, many experts believe he is not liable to prosecution as would be an ordinary citizen. (No one is certain, because the question has never arisen.) President Ford's pardon of Richard Nixon meant that he could not be prosecuted under federal law for things he may have done while in office.

Students may find the occasions of misconduct or disability remote and the details of succession or impeachment tedious. But the problem is not remote—succession has occurred nine times and disability at least twice—and what may appear tedious goes, in fact, to the heart of the presidency.

The first and fundamental problem is to make the office legitimate. That was the great task George Washington set himself, and that was the substantial accomplishment of his successors. Despite bitter and sometimes violent partisan and sectional strife that began almost immediately after Washington stepped down, presidential succession has always occurred peacefully, without a military coup or a political plot. For centuries, in the bygone times of kings as well as in the present times of dictators and juntas, peaceful succession has been a rare event among the nations of the world. In 1787, many of the Constitution's critics believed that peaceful succession would not happen in the United States either; somehow the president would connive to hold office for life or to handpick his successor. Their predictions were wrong, though their fears were understandable.

## How Powerful Is the President?

Just as members of Congress bemoan their loss of power, so presidents bemoan theirs. Can both be right?

In fact, they can. If Congress is less able to control events than it once was, it does not mean that the president is thereby more able to exercise control. The federal government as a *whole* has become more constrained, so it is less able to act decisively. The chief source of this constraint is the greater complexity of the issues with which Washington must deal.

Presidents have come to acquire certain rules of thumb for dealing with their political problems. Among them are these:

- *Move it or lose it.* A president who wants to get something done should do it early in his term, before his political influence erodes.
- *Avoid details.* President Carter's lieutenants regret having tried to do too much. Better to have three or four top priorities and forget the rest.
- *Cabinets don't get much accomplished; people do.* Find capable White House subordinates and give them well-defined responsibility; then watch them closely.<sup>22</sup>

## LEARNING OBJECTIVES .....

### 10-1 Explain how presidents differ from prime ministers and the rise of divided government in the United States.

Unlike prime ministers, American presidents are elected independently of Congress, which gives them both more independence in governing and more challenges in building political coalitions. Divided government has become much more common in the United States since the mid-20th century, with mixed consequences for policymaking.

### 10-2 Summarize how the constitutional and political powers of the presidency have evolved from the founding of the United States to the present.

The Framers developed the Constitution anticipating that Congress would be the most important institution in the national government. And it was, with a few exceptions, until the 20th century. Today, presidential power has grown significantly from its constitutional origins. Since the 1930s, the president has become the central figure in American politics, even though the president's ability to achieve political success remains highly dependent on other individuals and institutions.

### 10-3 Explain the importance of persuasion for presidential policymaking.

To make policy, a president must work closely with Congress and the federal bureaucracy, while being

attentive to public and political party expectations as well as media scrutiny. To win the support of advisers, political party members, Congress, and the public, a president needs to show why policy proposals are in their interest. The strength of the presidency depends chiefly on two things: the importance of military and foreign affairs and the president's personal popularity.

### 10-4 Discuss why presidential organization matters for policymaking.

A president's personality will influence how White House advisors convey and evaluate information as well as the organization of executive offices. Several organizations, from the White House Office to Cabinet departments, influence the president's policy program.

### 10-5 Describe presidential transitions and their consequences for presidential power.

The Constitution provides limited guidance on presidential transitions, creating four-year terms as well as the office of vice president, and establishing the procedure of impeachment. Subsequently, Congress has passed legislation on executive succession; constitutional amendments have limited a president to two terms of office and addressed the possibility of presidential disability. All of these provisions affect a president's ability to develop and enact a policy agenda.

## TO LEARN MORE .....

Official White House blog: [www.whitehouse.gov](http://www.whitehouse.gov)

#### Studies of Presidents:

Miller Center of Public Affairs, University of Virginia:  
[www.millercenter.virginia.edu/academic/americanpresident](http://www.millercenter.virginia.edu/academic/americanpresident)

The American Presidency Project, University of California at Santa Barbara: [www.presidency.ucsb.edu](http://www.presidency.ucsb.edu)

#### General:

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DEPARTMENT OF  
HOMELAND SECURITY  
U.S. Customs and Border Protection  
Laredo Port of Entry

## CHAPTER 11

# The Bureaucracy

### LEARNING OBJECTIVES

- 11-1** Discuss the unique features of the American federal bureaucracy.
- 11-2** Explain the evolution of the federal bureaucracy.
- 11-3** Summarize how the federal bureaucracy functions today.
- 11-4** Discuss checks on and problems with the federal bureaucracy, and possibilities for reform.



**bureaucracy** A large, complex organization composed of appointed officials.

For most people and politicians, *bureaucracy* is a pejorative word implying waste, confusion, red tape, and rigidity. But for scholars—and for bureaucrats themselves—

bureaucracy is a word with a neutral, technical meaning. A **bureaucracy** is a large, complex organization composed of appointed officials. By *complex*, we mean that authority is divided among several managers; no one person is able to make all the decisions. A large corporation is a bureaucracy; so also are a big university and a government agency. With its sizable staff, even Congress has become, to some degree, a bureaucracy.

What is it about complex organizations in general, and government agencies in particular, that leads so many people to complain about them? In part, the answer is to be found in their very size and complexity. But in large measure, the answer is to be found in the political context within which such agencies must operate. If we examine that context carefully, we will discover that many of the problems that we blame on “the bureaucracy” are in fact the result of what Congress, the courts, and the president do. And if we dig just a bit deeper, we will also discover that behind just about every government bureaucracy is some set of new or old public demands. Consider, for example, Washington bureaucracies’ roles with respect to keeping us safe from street criminals, cleaning up toxic waste sites, and making sure that all children have nutritious school lunches.

## THEN

The U.S. Department of Justice (USDOJ—this is bureaucracy, so enjoy all the alphabet soup) was established in 1789; but until a series of federal “crime bills” was enacted beginning in the 1960s, it had only an incidental role in crime control. For the most part, it neither funded nor worked closely with state and local criminal justice agencies. A USDOJ subunit, the Federal Bureau of Prisons (FBOP), was a tiny agency that held fewer inmates than many small state prison systems did.

## NOW

With public support for successive federal “wars on crime” and “wars on drugs,” the USDOJ and other federal agencies now spend billions of dollars each year to fund federal, state, and local agencies engaged in combating street crime; the FBOP now runs one of the largest prison systems in the world.

## THEN

Before the Environmental Protection Agency (EPA) was launched in 1970, the federal government’s environmental protection activities were virtually nonexistent.

## NOW

The media stories and public outcry that accompanied the discovery of lethal toxic waste sites in and around New York’s Love Canal area led in 1978 to the creation of the so-called

Superfund program. To administer Superfund, the EPA expanded in 1980, and since then there has been an expansion in federal environmental protection efforts and in federally directed state and local efforts.

## THEN

The first federal law providing for subsidized school lunches was passed in 1946, but it was not until the 1960s that Washington began expanding its programs in this area to include ever greater numbers of children eligible for free (or reduced-price) breakfasts and lunches.

## NOW

It was only in 2010 that the U.S. Department of Agriculture (USDA)—created in 1862, made a cabinet department in 1889, and long concerned mainly with the nation’s farms and agri-businesses—was mandated by law to work with local school districts and other organizations to make nutritious meals (breakfasts, lunches, and snacks) available to children in low-income households year-round, including in the summer months when school is out.

Whatever else it may be, bureaucracy is an outgrowth of representative democracy. If people demanded that government do less or do nothing, in due course public laws would change and the agencies that exist to translate those laws into administrative action would dissolve. But that has rarely happened in the United States. Instead, six of the federal government’s 15 cabinet agencies were created after 1964—including (next to the U.S. Department of Defense) its two largest and newest (the U.S. Department of Veterans Affairs, created in 1989, and the U.S. Department of Homeland Security, created in 2002).

## 11-1 Distinctiveness of the American Bureaucracy

As you might expect, much the same can be said for the growth of bureaucracy in other democratic nations. Indeed, bureaucratic government has become an obvious feature of all modern societies, democratic and non-democratic alike.

In the United States, however, three aspects of our constitutional system and political traditions give to the bureaucracy a distinctive character. First, political authority over the bureaucracy is not in one set of hands but is shared among several institutions. In a parliamentary regime such as in the United Kingdom, the appointed officials of the national government work for the cabinet ministers, who are in turn dominated by the prime minister. In theory, and to a considerable extent in practice, British bureaucrats report to and take orders from the ministers in charge of their departments, do not deal directly with Parliament, and rarely give interviews to the press. In the United States, the Constitution permits both the president and Congress to exercise authority over the bureaucracy. Every senior appointed official has at least two masters: one in the executive branch and the other in the legislative branch. Often there are many more than two: Congress, after all, is not a single organization but a

collection of committees, subcommittees, and individuals. This divided authority encourages bureaucrats to play one branch of government against the other and to make heavy use of the media.

Second, most of the agencies of the federal government share their functions with related agencies in state and local government. Though some federal agencies deal directly with American citizens—the Internal Revenue Service collects taxes from them, the Federal Bureau of Investigation looks into crimes for them, the Postal Service delivers mail to them—many agencies work with other organizations at other levels of government. For example, the Department of Education gives money to local school systems; the Centers for Medicare and Medicaid Services in the Department of Health and Human Services reimburse states for money spent on health care for the poor through Medicaid and other programs; the Department of Housing and Urban Development gives grants to cities for community development; and the Employment and Training Administration in the Department of Labor supplies funds to local governments so that they can run job-training programs. In France, by contrast, government programs dealing with education, health, housing, and employment are centrally run, with little or no control exercised by local governments.

Third, the institutions and traditions of American life have contributed to the growth of what some writers have described as an “adversary culture,” in which the definition and expansion of personal rights, and the defense of rights and claims through lawsuits as well as political action, are given central importance. A government agency in this country operates under closer public scrutiny and with a greater prospect of court challenges to its authority than in almost any other nation. Virtually every important decision of the Occupational Safety and Health Administration or of the Environmental Protection Agency is likely to be challenged in the courts or attacked by an affected party; in Sweden the decisions of similar agencies go largely uncontested.

The scope as well as the style of bureaucratic government differs. In most Western European nations, the government owns and operates large parts of the economy: The French government operates the railroads and owns companies that make automobiles and cigarettes; the Italian government owns many similar enterprises and also the nation’s oil refineries. In just about every large nation except the United States, the government owns the telephone system. Publicly operated enterprises account for about 12 percent of all employment in France, but less than 3 percent in the United States.<sup>1</sup> The U.S. government regulates privately owned enterprises to a degree not found in many other countries, however. Why we should have preferred regulation to ownership as the proper government role is an interesting question to which we return.

## Proxy Government

Much of our federal bureaucracy operates on the principle of **government by proxy**.<sup>2</sup> In every representative government, the voters elect legislators who make the laws, but in this country the bureaucrats often pay other people to do

the work. These “other people” include state and local governments, business firms, and nonprofit organizations.

Among the programs run this way are Social Security, Medicare, much environmental protection, and the collection of income taxes by withholding money from your paycheck. Even many military duties are contracted out.<sup>3</sup> In the first Gulf War in 1991, American soldiers outnumbered private contractors in the region by 60 to 1. But by 2006, there were nearly as many private workers as soldiers in Iraq. One company was paid \$7.2 billion to get food and supplies to our troops there.<sup>4</sup>

When Hurricanes Katrina and Rita hit our Gulf Coast, the nation’s response was managed by a small and weak group, the Federal Emergency Management Agency (FEMA). When the levees broke, it had only 2,600 employees; most of the help it was to provide came through “partners,” such as state and local agencies, and some of these were not very competent (see our discussion of this disaster in Chapter 3).

Critics of our government-by-proxy system argue that it does not keep track of how the money we send to public and private agencies is used. Congress, of course, could change matters around, but it has an interest in setting policies and defining goals, not in managing the bureaucracy or levying taxes. Moreover, the president and Congress like to keep the size of the federal bureaucracy small by giving jobs to people who are not on the federal payroll.<sup>5</sup>

Defenders of government by proxy claim that the system produces more flexibility, takes advantage of private and nonprofit skills, and defends the principle of federalism embodied in our Constitution. The defenders make fair points, but the system does produce certain everyday oddities—such as the fact that many average citizens receive costly federal government services over long periods of time without ever directly interacting with civil servants. Donald F. Kettl, a University of Maryland political scientist, dubbed this the “Mildred Paradox”: In her last several years of life, his aged and ill mother-in-law, Mildred, applied successfully for

**government by proxy**  
Washington pays state and local governments and private groups to staff and administer federal programs.



**IMAGE 11-1** Many people were taken by boat away from their New Orleans homes that were struck by Hurricane Katrina in 2005.

multiple federal health insurance programs and received several years' worth of different types of expensive institutional care and top-quality medical treatment—all at government expense—but without ever actually encountering a single government worker.<sup>6</sup>

Or look a bit closer at what we noted above regarding the U.S. Department of Agriculture (USDA). As a result of a new federal law (the Healthy, Hunger-Free Kids Act of 2010), the USDA is now required to expand and improve its “food security” programs by, among other measures, ensuring that all eligible low-income children have daily access to free meals (breakfast or lunch plus a snack) during the summer months when school is out. However, the new law does not even begin to specify just how the USDA and its scores of state and local government proxy agencies—not to mention their tens of thousands of administrative partners—are to accomplish that objective. Among big cities, Philadelphia has had the largest USDA-funded summer food program in the country (almost 4 million meals served each summer through more than 1,000 local “sites” including churches, recreation centers, and private homes on streets closed off for the purpose by local police). But the city's summer participation rate among eligible children still has been only about 50 percent. Given this complex web of administration, perhaps it is a surprise that the program works as well as it does.

## 11-2 The Evolution of the Federal Bureaucracy

The Constitution made scarcely any provision for an administrative system other than to allow the president to appoint, with the advice and consent of the Senate, “ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law.”<sup>7</sup> Departments and bureaus were not mentioned.

In the first Congress in 1789, James Madison introduced a bill to create a Department of State to assist the new secretary of state, Thomas Jefferson, in carrying out his duties. People appointed to this department were to be nominated by the president and approved by the Senate, but they were “to be removable by the president” alone. These six words, which would confer the right to fire government officials, occasioned six days of debate in the House. At stake was the locus of power over what was to become the bureaucracy. Madison's opponents argued that the Senate should consent to the removal of officials as well as their appointment. Madison responded that, without the unfettered right of removal, the president would not be able to control his subordinates, and without this control he would not be able to discharge his constitutional obligation to “take care that the laws be faithfully executed.”<sup>8</sup> Madison won, 29 votes to 22. When the issue went to the Senate, another debate resulted in a tie vote, broken in favor of the president by Vice President John Adams. The Department of State, and all cabinet departments created subsequently, would be run by people removable only by the president.

That decision did not resolve the question of who would really control the bureaucracy, however. Congress retained the right to appropriate money, to investigate the administration, and to shape the laws that would be executed by that administration—more than ample power to challenge any president who claimed to have sole authority over his subordinates. And many members of Congress expected the cabinet departments to report to Congress, even though they were headed by people removable by the president.

The government in Washington was at first minuscule. The State Department started with only nine employees; the War Department did not have 80 civilian employees until 1801. Only the Treasury Department, concerned with collecting taxes and finding ways to pay the public debt, had much power; only the Post Office Department provided any significant service.

## The Appointment of Officials

Small as the bureaucracy was, people struggled, often bitterly, over who would be appointed to it. From George Washington's day to modern times, presidents have found appointment to be one of their most important and difficult tasks. The officials they select affect how the laws are interpreted (thus the political ideology of the job holders is important), what tone the administration will display (thus personal character is important), how effectively the public business is discharged (thus competence is important), and how strong the political party or faction in power will be (thus party affiliation is important). Presidents trying to balance the competing needs of ideology, character, fitness, and partisanship have rarely pleased most people. As John Adams remarked, every appointment creates one ingrate and 10 enemies.

Because Congress was the dominant branch of government during most of the 19th and 20th centuries, congressional preferences often controlled the appointment of officials. And since Congress was a collection of people who represented local interests, appointments were made with an eye to rewarding the local supporters of members of Congress or building up local party organizations. These appointments made on the basis of political considerations—patronage—were later to become a major issue. They galvanized various reform efforts that sought to purify politics and to raise the level of competence of the public service. Many of the abuses the reformers complained about were real enough, but patronage served some useful purposes as well. It gave the president a way to ensure that his subordinates were reasonably supportive of his policies; it provided a reward the president could use to induce recalcitrant members of Congress to vote for his programs; and it enabled the building of party organizations to perform the necessary functions of nominating candidates and getting out the vote.

Though at first there were few jobs to fight over, by the middle of the 19th century there were many. From 1816 to 1861, the number of federal employees increased eightfold. This expansion was not, however, the result of the government's taking on new functions but of the increased demands on its traditional functions. The Post Office alone accounted for 86 percent of this growth.<sup>9</sup>



The Civil War was a great watershed in bureaucratic development. Fighting the war led, naturally, to hiring many new officials and creating many new offices. Just as important, the Civil War revealed the administrative weakness of the federal government—and led to demands by the civil service reform movement for improvement in the quality and organization of federal employees. And finally, the war was followed by a period of rapid industrialization and the emergence of a national economy. The effects of these developments could no longer be managed by state governments acting alone. With the creation of a nationwide network of railroads, commerce among the states became increasingly important. The constitutional powers of the federal government to regulate interstate commerce—long dormant for want of much commerce to regulate—now became an important source of controversy.

## A Service Role

From 1861 to 1901, new agencies were created, many to deal with particular sectors of society and the economy. More than 200,000 new federal employees were added, with only about half of this increase in the Post Office. The rapidly growing Pension Office began paying benefits to Civil War veterans; the Department of Agriculture was created in 1862 to help farmers; the Department of Labor was founded in 1882 to serve workers; and the Department of Commerce was organized in 1903 to assist businesspeople. Many more specialized agencies, such as the National Bureau of Standards, also came into being.

These agencies had one thing in common. Their role was primarily to serve, not to regulate. Most did research, gathered statistics, dispensed federal lands, or passed out benefits. Not until the Interstate Commerce Commission (ICC) was created in 1887 did the federal government begin to regulate the economy, other than by managing the currency, in any large way. Even the ICC had, at first, relatively few powers.

There were several reasons why federal officials primarily performed a service role. The values that had shaped the Constitution were still strong; these included a belief in limited government, the importance of states' rights, and the fear of concentrated discretionary power. The proper role of government in the economy was to promote, not to regulate, and a commitment to *laissez-faire*—a freely competitive economy—was strongly held. But just as important, the Constitution said nothing about giving any regulatory powers to bureaucrats. It gave to Congress the power to regulate commerce among the states. Now obviously Congress could not make the necessary day-to-day decisions to regulate, for example, the rates that interstate railroads charged to farmers and other shippers. Some agency or commission composed of appointed officials and experts would have to be created to do that. For a long time, however, the prevailing interpretation of the Constitution was that no such agency could exercise such regulatory powers unless Congress first set down clear standards that would govern the agency's decisions. As late as 1935, the Supreme Court held that a regulatory agency could not make rules on its own; it

could only apply the standards enacted by Congress.<sup>10</sup> The Court's view was that the legislature could not delegate its powers to the president or to an administrative agency.<sup>11</sup>

These restrictions on what administrators could do were set aside in wartime. During World War I, for example, President Woodrow Wilson was authorized by Congress to fix prices, operate the railroads, manage the communications system, and even control the distribution of food.<sup>12</sup> This kind of extraordinary grant of power usually ended with the war.

Some changes in the bureaucracy did not end with the war. During the Civil War, World War I, World War II, the Korean War, and the war in Vietnam, the number of civilian (as well as military) employees of the government rose sharply. These increases were not simply in the number of civilians needed to help serve the war effort; many of the additional people were hired by agencies, such as the Treasury Department, not obviously connected with the war. Furthermore, the number of federal officials did not return to prewar levels after each war. Though there was some reduction, each war left the number of federal employees larger than before.<sup>13</sup>

It is not hard to understand how this happens. During wartime, almost every government agency argues that its activities have *some* relation to the war effort, and few legislators want to be caught voting against something that may help that effort. Hence in 1944, the Reindeer Service in Alaska, an agency of the Interior Department, asked for more employees because reindeer are “a valued asset in military planning.”

## A Change in Role

Today's bureaucracy is largely a product of two events: the Great Depression of the 1930s (and the concomitant New Deal program of President Franklin Roosevelt) and World War II. Though many agencies have been added since then, the basic features of the bureaucracy were set mainly as a result of changes in public attitudes and in constitutional interpretation that occurred during these periods. The government was now expected to play an active role in dealing with economic and social problems. In the late 1930s, the Supreme Court reversed its earlier decisions (see Chapter 12) on the question of delegating legislative powers to administrative agencies) and upheld laws by which Congress merely instructs agencies to make decisions that serve “the public interest” in some area.<sup>14</sup> As a result, it was possible for President Nixon in 1971 to set up a system of price and wage controls based on a statute that simply authorized the president “to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries.”<sup>15</sup> The Cost of Living Council and other agencies that Nixon established to carry out this order were run by appointed officials who had the legal authority to make sweeping decisions based on general statutory language.

World War II was the first occasion during which the government made heavy use of federal income taxes—on individuals and corporations—to finance its activities. Between 1940 and 1945, total federal tax collections increased from

*laissez-faire* An economic theory that government should not regulate or interfere with commerce.



about \$5 billion to nearly \$44 billion. The end of the war brought no substantial tax reduction. The country believed that a high level of military preparedness continued to be necessary, and that various social programs begun before the war should enjoy the heavy funding made possible by wartime taxes. Tax receipts continued, by and large, to grow. Before 1913, when the Sixteenth Amendment to the Constitution was passed, the federal government could not collect income taxes at all (it financed itself largely from customs duties and excise taxes). From 1913 to 1940, income taxes were small (in 1940, the average American paid only \$7 in federal income taxes). World War II created the first great financial boom for the government, permitting the sustained expansion of a wide variety of programs—and thus entrenching a large number of administrators in Washington.<sup>16</sup>

A third event—the September 11, 2001, terrorist attacks on the United States—may have affected bureaucracy as profoundly as the depression of the 1930s and World War II. A law creating a massive new cabinet agency, the Department of Homeland Security (DHS), was passed in late 2002. Within two years of its creation, the DHS had consolidated under its authority 22 smaller federal agencies with nearly 180,000 federal employees (third behind Defense and Veterans Affairs) and over \$40 billion in budgets (fourth behind Defense, Health and Human Services, and Education). In addition, dozens of intergovernmental grant-making programs came under the authority of the DHS. In late 2004,

Congress passed another law that promised, over time, to centralize under a single director of national intelligence the work of the more than 70 federal agencies authorized to spend money on counterterrorist activities. But even after related reforms in 2006, dozens of different agencies were still authorized to spend money on counterterrorism activities. In 2013, the DHS faced sharp questioning from the House Subcommittee on Oversight and Management Efficiency, and the Government Accountability Office (GAO) once again ranked the DHS, which by then employed more than 220,000 employees, among those agencies with serious management problems.<sup>17</sup>

## 11-3 The Federal Bureaucracy Today

Presidents do not want to admit that they have increased the size of the bureaucracy. They can avoid saying this by pointing out that the number of civilians working for the federal government, excluding postal workers, has not increased significantly in recent years and is about the same today (2 million persons) as it was in 1960, and less than it was during World War II. This explanation is true but misleading, for it neglects the roughly 13 million people who work *indirectly* for Washington as employees of private firms and state or local agencies that are largely, if not entirely, supported by federal



## CONSTITUTIONAL CONNECTIONS

### Beyond Checks and Balances?

The Framers of the Constitution did not envision anything akin to today's federal bureaucracy, with its several million full-time employees and its millions more part-time employees. But far more surprising to the Framers than the sheer size of today's federal bureaucracy (after all, the country and its population have grown, too) would be its scope: cabinet departments, bureaus, independent agencies, government corporations, and regulatory commissions touching virtually every facet of the nation's economic, social, and civic life—trade, banking, labor, environmental protection, broadcasting, transportation, human services, health, housing, education, energy, environmental protection, space exploration, national parks, homeland security, and more. Beyond the contemporary federal bureaucracy's size and scope, the Framers might be mystified by the “proxy government” system described on pp. 223–224, and by how so many “federal” programs are actually jointly funded and administered by federal, state, and local governments in conjunction with for-profit firms and nonprofit organizations.

But would the Framers, in turn, view today's federal bureaucracy not only as a “fourth branch” of American national government but one that operates outside their system of separated powers and checks and balances, and that has transformed federalism (see Chapter 3) into Washington-controlled “intergovernmental administration”?

Some think so. They argue that federal agencies, including the Internal Revenue Service, the Environmental Protection Agency, and many others, routinely exercise not only executive powers but also lawmaking and judicial powers as well, and that state governments are required to fund or co-fund and administer many federal programs including large ones such as Medicaid. Moreover, they claim, Congress now commonly passes long and complicated laws and leaves it almost entirely to the discretion of federal bureaucrats to decide what the laws mean, how to apply them, and even in some cases how much to spend on them.

Others, however, think not. They argue that through federal laws that set boundaries on administrators' authority (like the Administrative Procedures Act of 1946), routine oversight of federal agencies by congressional committees and subcommittees, and federal court decisions limiting how far Washington can go in requiring state governments to fund or administer its programs, the federal bureaucracy's powers and the discretion exercised by Washington's appointed officials normally remain duly limited. We share this view: the “fourth branch” is far bigger and broader than the Framers could ever have envisioned, but most federal government agencies most of the time are checked and balanced by Congress and by other means.

funds. There are nearly three persons earning their living indirectly from the federal government for every one earning it directly. While federal employment has remained quite stable, employment among federal contractors and consultants and in state and local governments has mushroomed. Indeed, most federal bureaucrats, like most other people who work for the federal government, live outside Washington, D.C.

As Figure 11-1 shows, from 1990 to 2014, several federal executive departments reduced their workforce. The Department of Defense cut its civilian employees by almost one-third. Other Departments, including Agriculture and Treasury, also have fewer employees. The Department of Veterans Affairs expanded after 2007 as veterans from the wars in Iraq and Afghanistan began to return home. High growth also was evident in the U.S. Department of Justice (DOJ). This growth is explained mainly by the growth in just one DOJ unit, the Federal Bureau of Prisons (BOP)—one of the few federal agencies anywhere in the bureaucracy that was slow to join the trend toward what we described earlier in this chapter as government by proxy. The BOP administers nearly 200 facilities, from maximum-security prisons to community corrections centers, all across the country. Between 1990 and 2013, its staff doubled to nearly 39,000, while the prisoner populations these federal workers supervised more than doubled to about 276,000.<sup>18</sup>

The power of the federal bureaucracy cannot be measured by the number of employees, however. A bureaucracy of 5 million persons would have little power if each employee did nothing but type letters or file documents, whereas a bureaucracy of only 100 persons would have awesome power if each member were able to make arbitrary life-and-death decisions affecting the rest of us. The power of the bureaucracy depends on the extent to which appointed

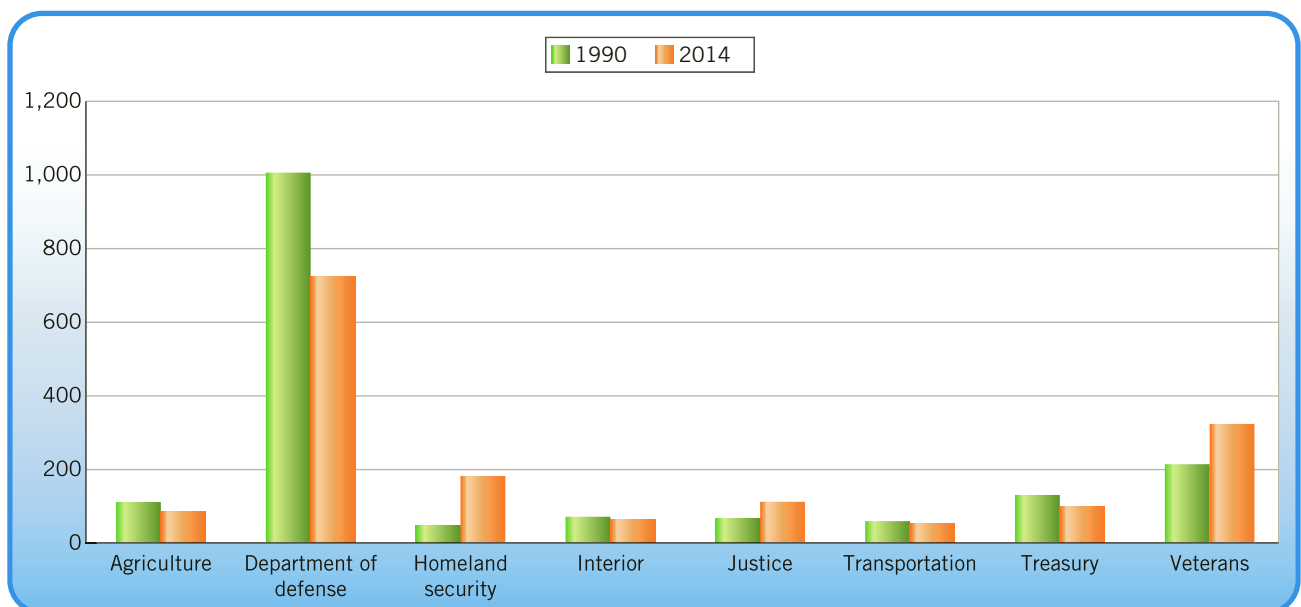
officials have **discretionary authority**—that is, the ability to choose courses of action and to make policies not spelled out in advance by laws. As Figure 11-2 shows, the volume of regulations issued has risen much faster than the rate of government spending (relative to gross domestic product)

and the number of federal employees who write the regulations and spend the money (federal employees who, as we have explained, often work mainly through state and local government employees and other administrative proxies).

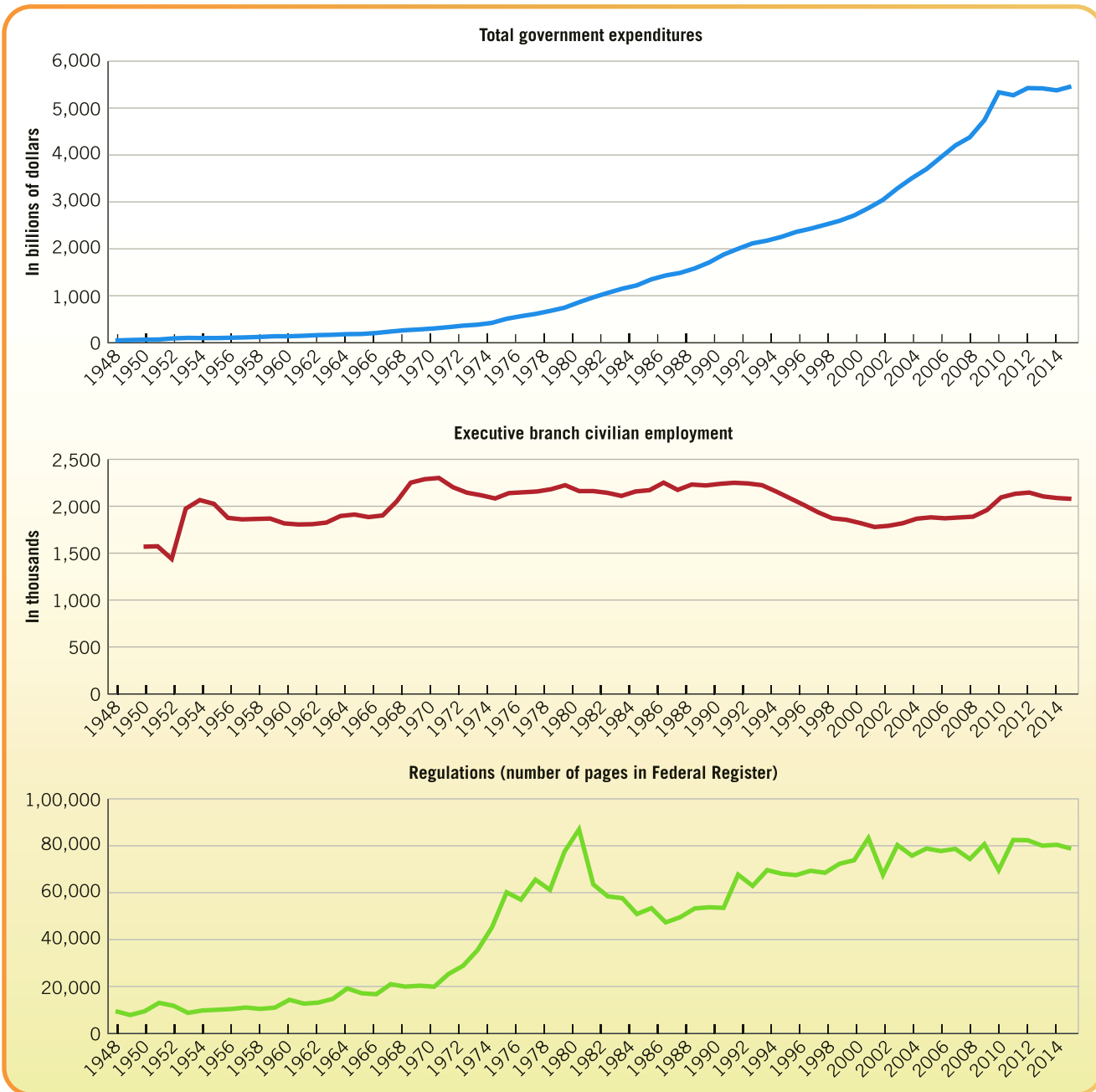
By this test, the power of the federal bureaucracy has grown enormously. Congress has delegated substantial authority to administrative agencies in three areas: (1) paying subsidies to particular groups and organizations in society (farmers, veterans, scientists, schools, universities, hospitals); (2) transferring money from the federal government to state and local governments (the grant-in-aid programs described in Chapter 3); and (3) devising and enforcing regulations for various sectors of society and the economy. Some of these administrative functions, such as grants-in-aid to states, are closely monitored by Congress; others, such as the regulatory programs, usually operate with a greater degree of independence. These delegations of power, especially in the areas of paying subsidies and regulating the economy, did not become commonplace until the 1930s, and then only after the Supreme Court decided that such delegations were constitutional. By contrast, today appointed officials can decide, within rather broad limits, who shall own a television station, what safety features automobiles shall have, what kinds of

**discretionary authority** The extent to which appointed bureaucrats can choose courses of action and make policies not spelled out in advance by laws.

**FIGURE 11-1** Federal Civilian Employment, 1990–2014



**Source:** Office of Management and Budget, *Fiscal Year 2016 Historical Tables: Budget of the U.S. Government*, Table 16.1, “Total Executive Branch Civilian Full-Time Equivalent Employees, 1990 and 2014,” [www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/hist.pdf](http://www.whitehouse.gov/sites/default/files/omb/budget/fy2016/assets/hist.pdf).

**FIGURE 11-2** The Growth of the Federal Government in Money, People, and Rules, 1940–2015

**Source:** Office of Management and Budget, *Fiscal Year 2016: Historical Tables-Budget of the U.S. Government*, Table 14.4, “Total Government Expenditures By Major Category of Expenditure, 1948–2014”; Office of Personnel Management, *Data, Analysis, & Documentation: Federal Employment Reports-Historical Federal Workforce Tables*, “Executive Branch Civilian Employment Since 1940”; *Federal Register*, “Federal Register Pages Published, 1936–2014.”

scientific research shall be specially encouraged, what drugs shall appear on the market, which dissident groups shall be investigated, what fumes an industrial smokestack may emit, which corporate mergers shall be allowed, what use shall be made of national forests, and what prices crop and dairy farmers shall receive for their products.

If appointed officials have this kind of power, then how they use it is of paramount importance in understanding modern government. There are, broadly, four factors that may explain the behavior of these officials:

1. The manner in which they are recruited and rewarded;
2. Their personal attributes, such as their socioeconomic backgrounds and their political attitudes;
3. The nature of their jobs;
4. The constraints that outside forces—political superiors, legislators, interest groups, journalists—impose on their agencies.

## Recruitment and Retention

The federal civil service system was designed to recruit qualified people on the basis of merit, not political patronage, and to retain and promote employees on the basis of performance, not political favoritism. Many appointed federal officials belong to the **competitive service**. This means they are appointed only after they have passed a written examination administered by the Office of Personnel Management (OPM) or met certain selection criteria (such as training, educational attainments, or prior experience) devised by the hiring agency and approved by the OPM. Where competition for a job exists and candidates can be ranked by their scores or records, the agency must usually appoint one of the three top-ranking candidates.

In recent years, the competitive service system has become decentralized, so that each agency now hires its own people without an OPM referral, and examinations have become less common. In 1952, more than 86 percent of all federal employees were civil servants hired by the competitive service; by 1996, that figure had fallen to less than 54 percent. Three things caused this decentralization and the increased use of ways other than exams to hire employees. First, the old OPM system was cumbersome and often not relevant to the complex needs of departments. Second, these agencies had a need for more professionally trained employees—lawyers, biologists, engineers, and computer specialists—who could not be ranked on the basis of some standard exam. And third, civil rights groups pressed Washington to make the racial composition of the federal bureaucracy look more like the racial composition of the nation.

Moreover, the kinds of workers being recruited into the federal civil service have changed. For example, blue-collar employment has fallen while the federal government's white-collar workforce has become more diverse occupationally. As one expert on civil service reform has noted, the "need to recruit and retain physicists, biologists, oceanographers, nurses, statisticians, botanists, and epidemiologists, as well as large numbers of engineers, lawyers, and accountants, now preoccupies federal personnel managers."<sup>19</sup>

Employees hired outside the competitive service are part of the excepted service. They now make up almost half of all workers. Though not hired by the OPM, they still are typically hired in a nonpartisan fashion. Some are hired by agencies—such as the CIA, the FBI, and the Postal Service—that have their own selection procedures.

About 3 percent of the excepted employees are appointed on grounds other than, or in addition to, merit. These legal exceptions exist to permit presidents to select, for policymaking and politically sensitive posts, people who are in agreement with their policy views. Such appointments are generally of three kinds:

1. Presidential appointments authorized by statute (cabinet and subcabinet officers, judges, U.S. marshals and U.S. attorneys, ambassadors, and members of various boards and commissions).
2. "Schedule C" appointments to jobs described as having a "confidential or policy-determining character"

below the level of cabinet or subcabinet posts (including executive assistants, special aides, and confidential secretaries).

3. Noncareer executive assignments (NEAs) given to high-ranking members of the regular competitive civil service or to persons brought into the civil service at these high levels. These people are involved deeply in the advocacy of presidential programs or participate in policymaking.

### **competitive service**

The government offices to which people are appointed on the basis of merit, as ascertained by a written exam or by applying certain selection criteria.

These three groups of excepted appointments constitute the patronage available to a president and his administration. When President Kennedy took office in 1961, he had 451 political jobs to fill. When President Barack Obama took office in 2009, he had more than four times that number, including nearly four times the number of top cabinet posts. Scholars disagree over whether this proliferation of political appointees has improved or worsened Washington's performance, but one thing is clear: widespread presidential patronage is hardly unprecedented. In the 19th century, practically every federal job was a patronage job. For example, when Grover Cleveland, a Democrat, became president in 1885, he replaced some 40,000 Republican postal employees with Democrats.

Ironically, two years earlier, in 1883, the passage of the Pendleton Act had begun a slow but steady transfer of federal jobs from the patronage to the merit system. It may seem strange that a political party in power (the Republicans) would be willing to relinquish its patronage in favor of a merit-based appointment system. Two factors made it possible for the Republicans to pass the Pendleton Act: (1) public outrage over the abuses of the spoils system, highlighted by the assassination of President James Garfield by a man always described in the history books as a "disappointed office seeker" (*lunatic* would be a more accurate term); and



**IMAGE 11-2** In 2010, fire erupted from the offshore oil rig operated by BP in the Gulf of Mexico near American land, creating an environmental disaster and requiring a federal investigation and response.



(2) the fear that if the Democrats came to power on a wave of antispills sentiment, existing Republican officeholders would be fired. (The Democrats won anyway.)

The merit system spread to encompass most of the federal bureaucracy, generally with presidential support. Though presidents may have liked in theory the idea of hiring and firing subordinates at will, most felt that the demands for patronage were impossible either to satisfy or to ignore. Furthermore, by increasing the coverage of the merit system, a president could “blanket in” patronage appointees already holding office, thus making it difficult or impossible for the next administration to fire them.

## Constraints

The biggest difference between a government agency and a private organization is the vastly greater number of constraints on the agency. Unlike a business firm, the typical government bureau cannot hire, fire, build, or sell without going through procedures set down in laws. How much money it pays its members is determined by statute, not by the market. Not only the goals of an agency, but often its exact procedures, are spelled out by Congress.

At one time, the Soil Conservation Service was required by law to employ at least 14,177 full-time workers. The State Department has been forbidden by law from opening a diplomatic post in Antigua or Barbuda, but forbidden from closing a post anywhere else. The Agency for International Development (which administers our foreign-aid program) has 33 objectives and 75 priorities, as identified by Congress, and must send to Congress 288 reports each year. When it buys military supplies, it must give a “fair proportion” of its contracts to small businesses, especially those operated by “socially and economically disadvantaged individuals,” and must buy from American firms even if, in some cases, buying abroad would be cheaper. Some of the more general constraints include the following:

- *Administrative Procedure Act (1946)*. Before adopting a new rule or policy, an agency must give notice, solicit comments, and often hold hearings.
- *Freedom of Information Act (1966)*. Citizens have the right to inspect all government records except those containing military, intelligence, or trade secrets or revealing private personnel actions.
- *National Environmental Policy Act (1969)*. Before undertaking any major action affecting the environment, an agency must issue an environmental impact statement.
- *Privacy Act (1974)*. Government files about individuals, such as Social Security and tax records, must be kept confidential.
- *Open Meeting Law (1976)*. Every part of every agency meeting must be open to the public unless certain matters (e.g., military or trade secrets) are being discussed.

One of the biggest constraints on bureaucratic action is that Congress rarely gives any job to a single agency. Stopping drug trafficking is the task of the Customs Service, the

FBI, the Drug Enforcement Administration, the Border Patrol, and the Defense Department (among others). Disposing of the assets of failed savings-and-loan associations was the job of the Resolution Funding Corporation, Resolution Trust Corporation, Federal Housing Finance Board, Office of Thrift Supervision in the Treasury Department, Federal Deposit Insurance Corporation, Federal Reserve Board, and Justice Department (among others). Similarly, in the aftermath of the 2007 financial crisis, many different agencies were involved in the TARP program, the bailouts, and programs to help homeowners who could no longer afford their homes.

The effects of these constraints on agency behavior are not surprising.

- The government will often act slowly. (The more constraints that must be satisfied, the longer it will take to get anything done.)
- The government will sometimes act inconsistently. (What is done to meet one constraint, such as freedom of information, may endanger another constraint, such as privacy.)
- It will be easier to block action than to take action. (The constraints ensure that lots of voices will be heard; the more voices heard, the more they may cancel each other out.)
- Lower-ranking employees will be reluctant to make decisions on their own. (Having many constraints means having many ways to get into trouble; to avoid trouble, let your boss make the decision.)
- Citizens will complain of red tape. (The more constraints to serve, the more forms to fill out.)

These constraints do not mean government bureaucracy is powerless—only that, however great its power, it tends to be clumsy. That clumsiness is not a reflection of the people who work for agencies, but of the complicated political environment in which that work must be done.

The moral of the story: the next time you get mad at a bureaucrat, ask yourself, why would a rational, intelligent person behave that way? Chances are you will discover there are good reasons for that action. You would probably behave the same way if you were working for the same organization.

## 11-4 Checks, Problems, and Possibilities for Reform

Government agencies behave as they do in large part because of the many different goals they must pursue and the complex rules they must follow. Where does all this red tape come from?

From us. From us, the people.

## Checks

Every goal, every constraint, every bit of red tape was put in place by Congress, the courts, the White House, or the agency itself responding to the demands of some influential faction. Civil rights groups want every agency to hire and

buy from women and minorities. Environmental groups want every agency to file environmental impact statements. Industries being regulated want every new agency policy to be formulated only after a lengthy public hearing with lots of lawyers present. Labor unions also want those hearings so that they can argue against industry lawyers. Everybody who sells something to the government wants a “fair chance” to make the sale, and so everybody insists that government contracts be awarded only after complex procedures are followed. A lot of people don’t trust the government, and so they insist that everything it does be done in the sunshine—no secrets, no closed meetings, no hidden files.

If we wanted agencies to pursue their main goal with more vigor and less encumbering red tape, we would have to ask Congress, the courts, or the White House to repeal some of these constraints. In other words, we would have to be willing to give up something we want in order to get something else we want even more. But politics does not encourage people to make these trade-offs. Instead, it encourages us to expect to get everything—efficiency, fairness, help for minorities—all at once.

## Agency Allies

Despite these constraints, government bureaucracies are not powerless. In fact, some of them actively seek certain constraints. They do so because it is a way of cementing a useful relationship with a congressional committee or an interest group.

At one time, scholars described the relationship between an agency, a committee, and an interest group as an **iron triangle** (see Figure 11-3). For example, Department of Veterans Affairs, the House and Senate committees on veterans’ affairs, and veterans’ organizations (such as the American Legion) would form a tight, mutually advantageous

alliance. The department would do what the committees wanted, and in return get political support and budget appropriations; the committee members would do what the veterans’ groups wanted, and in return get votes and campaign contributions. Iron triangles are examples of what are called *client politics* (see our discussion of client politics in Chapter 1 for more details).

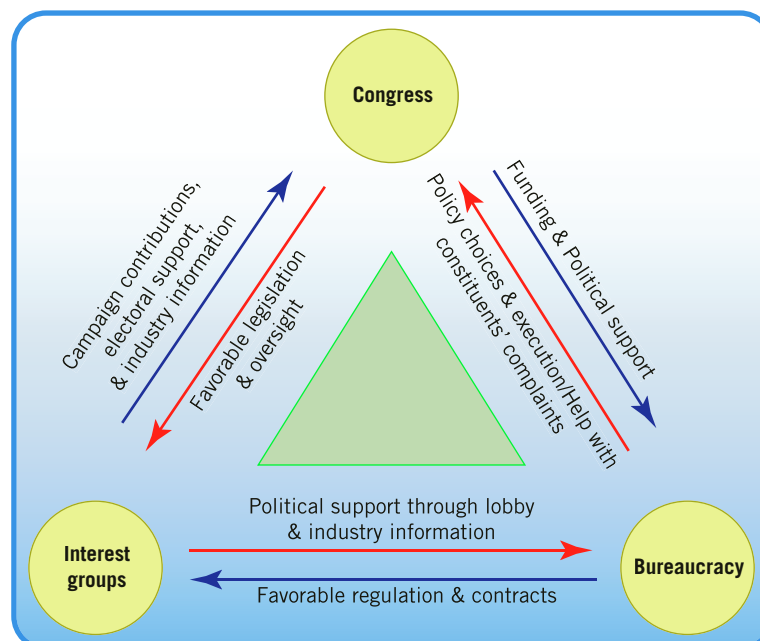
Many agencies still have important allies in Congress and the private sector, especially those bureaus that serve the needs of specific sectors of the economy or regions of the country. The Department of Agriculture works closely with farm organizations, the Department of the Interior with groups interested in obtaining low-cost irrigation or grazing rights, and the Department of Housing and Urban Development with mayors and real-estate developers.

Sometimes these allies are so strong that they can defeat a popular president. For years, President Reagan tried to abolish the Small Business Administration (SBA), arguing that its program of loans to small firms was wasteful and riddled with favoritism. But Congress, reacting to pressures from small-business groups, rallied to the SBA’s defense. As a result, Reagan had to oversee an agency that he didn’t want.

But iron triangles are much less common today than they once were. Politics of late has become far more complicated. For one thing, the number and variety of interest groups have increased so much in recent years that scarcely any agency is not subject to pressures from several competing interests, instead of from only one powerful interest. For another, the growth of subcommittees in Congress has meant most agencies are subject to control by many different

**iron triangle** A close relationship between an agency, a congressional committee, and an interest group.

**FIGURE 11-3** Iron Triangle



**issue network** A network of people in Washington, D.C.-based interest groups, on congressional staffs, in universities and think tanks, and in the mass media, who regularly discuss and advocate public policies.

**authorization legislation**

Legislative permission to begin or continue a government program or agency.

**appropriation** A legislative grant of money to finance a government program or agency.

legislative groups, often with very different concerns. Finally, the courts have made it much easier for all kinds of individuals and interests to intervene in agency affairs.

As a result, nowadays government agencies face a bewildering variety of competing groups and legislative subcommittees that constitute not a loyal group of allies, but a fiercely contentious collection of critics. The Environmental Protection Agency is caught between the demands of environmentalists and of industry organizations, the Occupational Safety and Health Administration between the pressures of labor and of business, the Federal Communications Commission between the desires of broadcasters and of cable television companies. Even the Department of Agriculture faces

not a unified group of farmers, but many different farmers split into rival groups depending on the crops they raise, the regions in which they live, and the attitudes they have toward the relative merits of farm subsidies or free markets.

Political scientist Hugh Heclo has described the typical government agency today as embedded not in an iron triangle, but in an **issue network**.<sup>20</sup> These issue networks consist of people in Washington-based interest groups, on congressional staffs, in universities and think tanks, and in the mass media who regularly debate government policy on a certain subject—say, health care or auto safety. The networks are contentious, split along political, ideological, and economic lines. When a president takes office, he often recruits key agency officials from those members of the issue network who are most sympathetic to his views.

When Jimmy Carter, a Democrat, became president, he appointed to key posts in consumer agencies people who were from that part of the consumer issue network associated with Ralph Nader. Ronald Reagan, a conservative Republican, filled these same jobs with people who were from that part of the issue network holding free-market or antiregulation views. When George Bush the elder, a more centrist Republican, took office, he filled these posts with more centrist members of the issue network. Bill Clinton brought back the consumer activists. George W. Bush reversed Clinton, and Barack Obama reversed Bush.

## Congressional Oversight

The main reason some interest groups are important to agencies is that they are important to Congress. Not every interest group in the country has substantial access to Congress, but those that do and that are taken seriously by the relevant committees or subcommittees must also be taken seriously

by the agency. Furthermore, even apart from interest groups, members of Congress have constitutional powers over agencies and policy interests in how agencies function.

Congressional supervision of the bureaucracy takes several forms. First, no agency may exist (except for a few presidential offices and commissions) without congressional approval. Congress influences—and sometimes determines precisely—agency behavior by the statutes it enacts.

Second, no money may be spent unless it has first been authorized by Congress. **Authorization legislation** originates in a legislative committee (such as Agriculture, Education and Labor, or Public Works) and states the maximum amount of money that an agency may spend on a given program. This authorization may be permanent, it may be for a fixed number of years, or it may be annual (i.e., it must be renewed each year, or the program or agency goes out of business).

Third, even funds that have been authorized by Congress cannot be spent unless, in most cases, they are also appropriated. Appropriations usually are made annually, and they originate not with the legislative committees but with the House Appropriations Committee and its various (and influential) subcommittees. An **appropriation**—money set aside formally for a specific use—may be, and often is, for less than the amount authorized. The Appropriations Committee's action thus tends to have a budget-cutting effect. There are some funds that can be spent without an appropriation, but in virtually every part of the bureaucracy, each agency is keenly sensitive to congressional concerns at the time that the annual appropriations process is going on.

But when Congress engages in oversight of agencies that are in the executive branch, is fidelity to the constitutional principle of separation of powers (see Chapter 2) called into question? Members of Congress themselves once debated that issue, but the aforementioned Administrative Procedure Act of 1946 and a dozen subsequent laws that built on it—the latest being the Data Quality Act of 2000, and all upheld when challenged in the courts—are predicated on the idea that agencies are “adjuncts for legislative functions. ... Congress lacks the capacity to legislate on all matters it touches and perforce must delegate a great deal of legislative authority to the agencies.”<sup>21</sup>

This idea was challenged during the George W. Bush presidency by administration officials and others who argued—especially but not exclusively with respect to military, national, and homeland security issues—that agencies were bound to act in accordance with the president's directives whenever they conflicted with directives from Congress. While Bush's executive-centered approach sparked many controversies, most scholars seem to think that it effected no major or lasting changes, and some suggest that it stirred Congress to pursue even more comprehensive (and aggressive) oversight policies and practices.<sup>22</sup>

**The Appropriations Committee and Legislative Committees** The fact that an agency budget must be both authorized and appropriated means that each agency serves not one congressional master but several, and that these masters may be in conflict. The Appropriations

Committee exercises the real power over an agency's budget; the legislative committees are especially important when a substantive law is first passed or an agency is first created, or when an agency is subject to annual authorization. In the past, the power of the Appropriations Committee was rarely challenged; from 1947 through 1962, fully 90 percent of the House Appropriations Committee's recommendations on expenditures were approved by the full House without change.<sup>23</sup> Furthermore, the Appropriations Committee tends to recommend less money than an agency requests (though some specially favored agencies, such as the FBI, the Soil Conservation Service, and the Forest Service, have tended to get almost everything that they have asked for). Finally, the process of "marking up" (revising, amending, and approving) an agency's budget request gives to the Appropriations Committee, or one of its subcommittees, substantial influence over the policies that the agency follows. Of late, the appropriations committees have lost some of their great power over government agencies. This has happened in three ways. First, Congress has created trust funds to pay for the benefits many people receive. The Social Security trust fund is the largest of these. In 2012, it took in \$729 billion in Social Security taxes and paid out \$635 billion in old-age benefits. There are several other trust funds as well. **Trust funds** operate outside the regular government budget, and the appropriations committees have no control over these expenditures. They are automatic.

Second, Congress has changed the authorization of many programs from permanent or multiyear to annual authorizations. This means that every year the legislative committees, as part of the reauthorization process, get to set limits on what these agencies can spend. This limits the ability of the appropriations committees to determine the spending limits. Before 1959, most authorizations were permanent or multiyear. Now a long list of agencies must be reauthorized every year—the State Department, NASA, military procurement programs of the Defense Department, the Justice Department, the Energy Department, and parts or all of many other agencies.

Third, the existence of huge budget deficits during the 1980s and in the 2000s has meant that much of Congress's time has been taken up with trying—usually not very successfully—to keep spending down. As a result, there rarely has been much time to discuss the merits of various programs or how much ought to be spent on them; instead, attention has been focused on meeting a target spending limit. In 1981, the budget resolution passed by Congress mandated cuts in several programs before the appropriations committees had even completed their work.<sup>24</sup> In addition to the power of the purse, there are informal ways by which Congress can control the bureaucracy. An individual member of Congress can call an agency head on behalf of a constituent. Most such calls merely seek information, but some result in, or attempt to obtain, special privileges for particular people. Congressional committees may also obtain the right to pass on certain agency decisions. This is called **committee clearance**, and though it usually is not legally binding on the agency, few agency heads will ignore the expressed wish

of a committee chair that he or she be consulted before certain actions (such as transferring funds) are taken.

**The Legislative Veto** For many decades, Congress made frequent use of the legislative veto to control bureaucratic or presidential actions. A **legislative veto** is a requirement that an executive decision must lie before Congress for a specified period (usually 30 or 90 days) before it takes effect. Congress could then veto the decision if a resolution of disapproval was passed by either house (a "one-house veto") or both houses (a "two-house veto"). Unlike laws, such resolutions were not signed by the president. Between 1932 and 1980, about 200 laws were passed providing for a legislative veto, many of them involving presidential proposals to sell arms abroad.

But in June 1983, the Supreme Court declared the legislative veto to be unconstitutional. In the *Chadha* case, the Court held that the Constitution clearly requires in Article I that "every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary" (with certain minor exceptions) "shall be presented to the President of the United States," who must either approve it or return it with his veto attached. In short, Congress cannot take any action that has the force of law unless the president concurs in that action.<sup>25</sup> With a stroke of the pen, parts of 200 laws suddenly became invalid. At least that happened in theory. In fact, since the *Chadha* decision, Congress has passed a number of laws that contain legislative vetoes, despite the Supreme Court having ruled against them! (Someone will have to go to court to test the constitutionality of these new provisions.)

Opponents of the legislative veto hope future Congresses will have to pass laws that state what an agency may or may not do much more clearly than before. But it is just as likely that Congress will continue to pass laws stated in general terms and require that agencies implementing those laws report their plans to Congress, so that it will have a chance to enact and send to the president a regular bill disapproving the proposed action. Or Congress may rely on informal, but scarcely weak, means of persuasion—including threats to reduce the appropriations of an agency that does not abide by congressional preferences.

**Congressional Investigations** Perhaps the most visible and dramatic form of congressional supervision of an agency is the investigation. Since 1792, when Congress investigated an army defeat by a Native American tribe, congressional

**trust funds** Funds for government programs collected and spent outside the regular government budget.

**committee clearance** The ability of a congressional committee to review and approve certain agency decisions in advance and without passing a law.

**legislative veto** The authority of Congress to block a presidential action after it has taken place. The Supreme Court has held that Congress does not have this power.



**red tape** Complex bureaucratic rules and procedures that must be followed to get something done.

investigations of the bureaucracy have been a regular feature—sometimes constructive, sometimes destructive—of legislative-executive relations. The investigative power is not mentioned in the Constitution, but has been inferred from the power to legislate. The Supreme Court has upheld this interpretation consistently, though it has also said that such investigations should not be solely for the purpose of exposing the purely personal affairs of private individuals and must not operate to deprive citizens of their basic rights.<sup>26</sup> Congress may compel a person to attend an investigation by issuing a subpoena; anyone who ignores the subpoena may be punished for contempt. Congress can vote to send the person to jail or can refer the matter to a court for further action. As explained in Chapter 14, the president and his principal subordinates have refused to answer certain congressional inquiries on grounds of “executive privilege.”

Although many areas of congressional oversight—budgetary review, personnel controls, investigations—are designed to control the exercise of bureaucratic discretion, other areas are intended to ensure the freedom of certain agencies from effective control, especially by the president. In dozens of cases, Congress has authorized department heads and bureau chiefs to operate independently of presidential preferences. For example, Congress has resisted presidential efforts to ensure that policies to regulate pollution do not impose excessive costs on the economy, and interest groups have brought suit to prevent presidential coordination of various regulatory agencies. If the bureaucracy sometimes works at cross-purposes, it usually is because Congress—or competing committees in Congress—wants it that way.

## Bureaucratic “Pathologies”

Everyone complains about bureaucracy in general (though rarely about bureaucratic agencies that everyone believes are desirable). This chapter should persuade you that it is difficult to say anything about bureaucracy “in general”; there are too many different kinds of agencies, kinds of bureaucrats, and kinds of programs to label the entire enterprise with a single adjective. Nevertheless, many people who recognize the enormous variety among government agencies still believe they all have some general features in common and suffer from certain shared problems or pathologies.

This is true enough, but the reasons for it—and the solutions, if any—are often not understood. There are five major or at least frequently mentioned problems with bureaucracies: red tape, conflict, duplication, imperialism, and waste. **Red tape** refers to the complex rules and procedures that must be followed to get something done. (As early as the seventh century, legal and government documents in England were bound together with a tape of pinkish-red color. Since then *red tape* has come to mean “bureaucratic delay or confusion,” especially that accompanied by unnecessary paperwork.<sup>27</sup>) **Conflict** exists because some agencies seem to be working at cross-purposes with other agencies. (For example, the Agricultural Research Service tells farmers how

to grow crops more efficiently, while the Agricultural Stabilization and Conservation Service pays farmers to grow fewer crops or to produce less.) **Duplication** (usually called “wasteful duplication”) occurs when two government agencies seem to be doing the same thing, as when the Customs Service and the Drug Enforcement Administration both attempt to intercept illegal drugs being smuggled into the country. **Imperialism** refers to the tendency of agencies to grow without regard to the benefits that their programs confer or the costs that they entail. **Waste** means spending more than is necessary to buy some product or service.

These problems all exist, but not necessarily because bureaucrats are incompetent or power-hungry. Most exist because of the very nature of government itself. Take red tape. We encounter cumbersome rules and procedures partly because any large organization, governmental or not, must have some way of ensuring that one part of the organization does not operate out of step with another. Business corporations have red tape also; to a certain extent it is a consequence of bigness. But a great amount of governmental red tape is also the result of the need to satisfy legal and political requirements. Government agencies must hire on the basis of “merit,” must observe strict accounting rules, must supply Congress with detailed information on their programs, and must allow for citizen access in countless ways. Meeting each need requires rules; enforcing the rules requires forms. One person’s red tape is another person’s valued procedural safeguard.

Or take conflict and duplication. They do not occur because bureaucrats enjoy conflict or duplication—quite the contrary! They exist because Congress, in setting up agencies and programs, often wants to achieve a number of different, partially inconsistent goals or finds that it cannot decide which goal it values the most. Congress has 535 members and little strong leadership; it should not be surprising that 535 people will want different things and will sometimes succeed in getting them.

Imperialism results in large part from government agencies seeking goals so vague and difficult to measure that it is hard to tell when they have been attained. When Congress



David McNew/Getty Images

**IMAGE 11-3** At the world’s busiest border crossing, cars line up to enter the United States in Tijuana, Mexico, where passengers must first meet strict immigration requirements overseen by the U.S. Customs and Border Patrol.

is unclear as to exactly what an agency is supposed to do, the agency will often convert that legislative vagueness into bureaucratic imperialism by taking the largest possible view of its powers. It may do this on its own; more often it does so because interest groups and judges rush in to fill the vacuum left by Congress. As we saw in Chapter 3, the 1973 Rehabilitation Act was passed with a provision barring discrimination against people with disabilities in any program receiving federal aid. Under pressure from people with disabilities, that lofty but vague goal was converted by the Department of Transportation into a requirement that virtually every big-city bus have a device installed to lift people in wheelchairs onboard.

Waste is probably the biggest criticism that people have of the bureaucracy. Everybody has heard stories of the Pentagon's paying \$91 for screws that cost 3 cents in the hardware store. President Reagan's "Private Sector Survey on Cost Control," generally known as the Grace Commission (after its chairman, J. Peter Grace), publicized these and other tales in a 1984 report.

No doubt there is waste in government. After all, unlike a business firm worried about maximizing profits, in a government agency there are only weak incentives to keep costs down. If a business employee cuts costs, he or she often receives a bonus or raise, and the firm gets to add the savings to its profits. If a government official cuts costs, he or she receives no reward, and the agency cannot keep the savings—they go back to the Treasury.

But many of the horror stories are either exaggerations or unusual occurrences.<sup>28</sup> Most of the screws, hammers, and light bulbs purchased by the government are obtained at low cost by means of competitive bidding among several suppliers. When the government does pay outlandish amounts, the reason typically is that it is purchasing a new or one-of-a-kind item not available at your neighborhood hardware store—for example, a new bomber or missile.

Even when the government is not overcharged, it still may spend more money than a private firm in buying what it needs. The reason is red tape—the rules and procedures designed to ensure that when the government buys something, it will do so in a way that serves the interests of many groups. For example, it often must buy from American rather than foreign suppliers, even if the latter charge a lower price; it must make use of contractors that employ minorities; it must hire only union laborers and pay them the "prevailing" (i.e., the highest) wage; it must allow public inspection of its records; it frequently is required to choose contractors favored by influential members of Congress; and so on. Private firms do not have to comply with all these rules and thus can buy for less.

From this discussion, it should be easy to see why these five basic bureaucratic problems are so hard to correct. To end conflicts and duplication, Congress would have to make some policy choices and set some clear priorities, but with all the competing demands that it faces, Congress finds it difficult to do that. You make more friends by helping people than by hurting them, and so Congress is more inclined to add new programs than to cut old ones, whether or not the new programs are in conflict with existing ones.

To check imperialism, some way would have to be found to measure the benefits of government, but that is often impossible; government exists in part to achieve precisely those goals—such as national defense—that are least measurable. Furthermore, what might be done to remedy some problems would make other problems worse. If you simplify rules and procedures to cut red tape, you also are likely to reduce the coordination among agencies, and thus increase the extent to which there is duplication or conflict. If you want to reduce waste, you will need more rules and inspectors—in short, more red tape. Generally, the problem of bureaucracy is inseparable from the problem of government.

Just as people are likely to say they dislike Congress but like their own member of Congress, they are inclined to express hostility toward "the bureaucracy" but goodwill for that part of the bureaucracy with which they have dealt personally. While most Americans have unfavorable impressions of government agencies and officials in general, they have quite favorable impressions about government agencies and officials with whom they have had direct contact or about which they claim to know something specific.

For example, Figure 11-4 shows that wide majorities have very or somewhat favorable impressions of diverse federal government agencies. Surveys dating back decades suggest that, despite persistent public complaints about "the bureaucracy," most Americans have judged, and continue to judge, each federal agency to be fair and useful.<sup>29</sup>

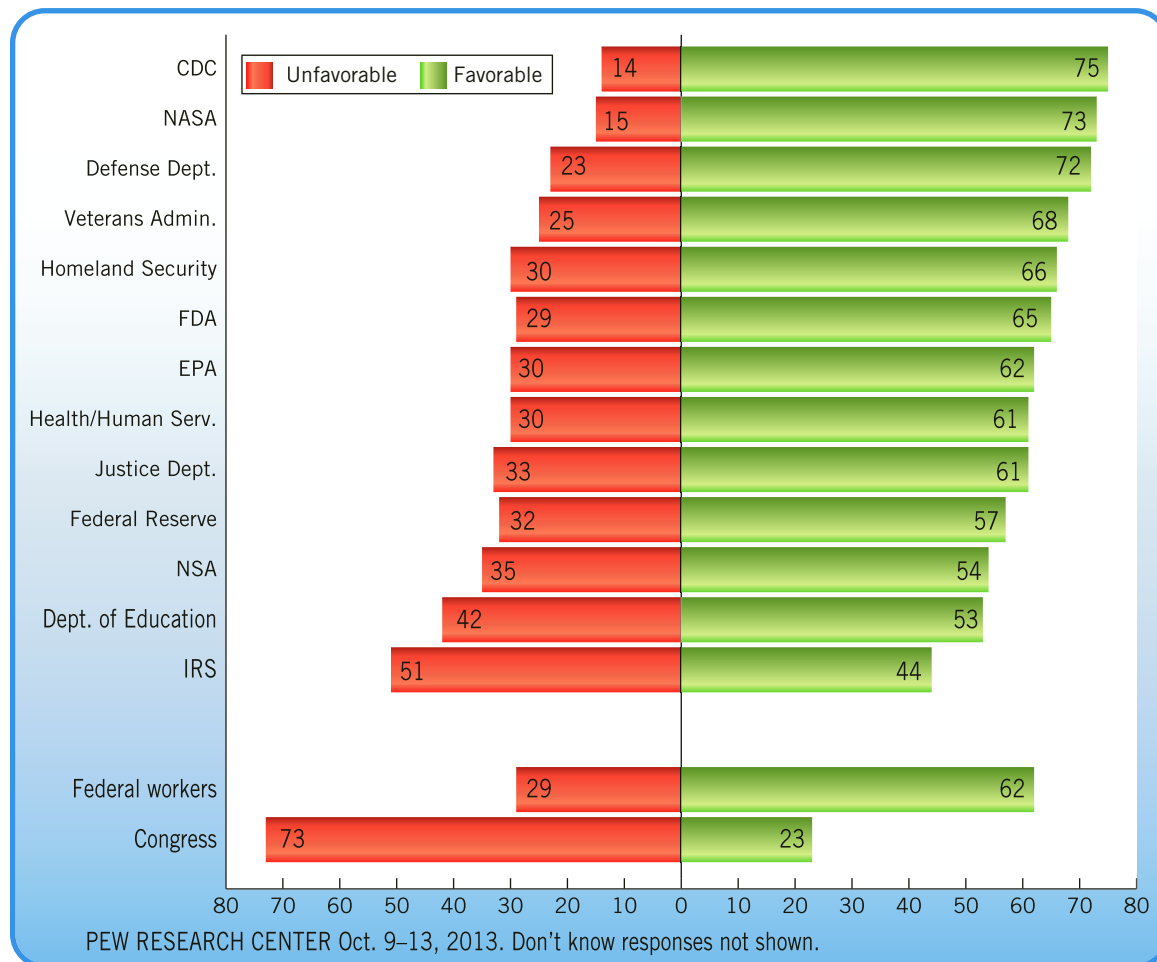
This finding helps explain why government agencies are rarely reduced in size or budget; whatever the popular feelings about the bureaucracy, any given agency tends to have many friends. Even the much-criticized FEMA, viewed unfavorably by half the public, was able to fend off budget cuts in the several years following its failed response to Hurricane Katrina.

## Reforming the Bureaucracy

The history of American bureaucracy has been punctuated with countless efforts to make it work better and cost less. There were 11 major attempts in the 20th century alone. The latest was the National Performance Review (NPR)—popularly called the plan to "reinvent government"—led by Vice President Al Gore.

The NPR differed from many of the preceding reform efforts in one important way. Most of the earlier ones suggested ways of increasing central (i.e., presidential) control of government agencies: the Brownlow Commission (1936–1937) recommended giving the president more assistants, the First Hoover Commission (1947–1949) suggested ways of improving top-level management, and the Ash Council (1969–1971) called for consolidating existing agencies into a few big "super departments." The intent was to make it easier for the president and his cabinet secretaries to run the bureaucracy. The key ideas were efficiency, accountability, and consistent policies.

The NPR, by contrast, emphasized customer satisfaction (the "customers" in this case being the citizens who come into contact with federal agencies). To the authors

**FIGURE 11-4** How the Public Views Particular Federal Agencies

**Source:** Pew Research Center, “Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably,” October 18, 2013.

of the NPR report, the main problem with the bureaucracy was that it had become too centralized, too rule-bound, too unconcerned with making programs work, and too preoccupied with avoiding scandal. The NPR report contained many horror stories about useless red tape, excessive regulations, and cumbersome procurement systems that make it next to impossible for agencies to do what they were created to do. (For example, when smoking was permitted in federal office buildings, the General Services Administration issued a nine-page document that described an ashtray and specified how many pieces it must break into, should it be hit with a hammer.)<sup>30</sup>

To solve these problems, the NPR called for less centralized management and more employee initiative, fewer detailed rules and more emphasis on customer satisfaction. It sought to create a new kind of organizational culture in government agencies, one more like that found in the more innovative, quality-conscious American corporations. The

NPR was reinforced legislatively by the Government Performance and Results Act (GPRA) of 1993, which required agencies “to set goals, measure performance, and report on the results.”

President George W. Bush built on the Clinton-Gore NPR efforts and the GPRA using the Performance Assessment Rating Tool (PART). The main goal of the PART was to link management reform to the budget process. During the 2008 presidential campaign, Barack Obama harkened back to the Clinton-Gore NPR, but also pledged to keep but improve Bush’s PART. By Obama’s second term, however, administrative reform was not mentioned widely among main priorities or accomplishments in office.

Reforming the bureaucracy is easier said than done. Most of the rules and red tape that make it hard for agency heads to do a good job are the result either of the struggle between the White House and Congress for control over the agencies or of the agencies’ desire to avoid irritating

## HOW WE COMPARE

### Outsourcing Government

In the United States, government by proxy is the norm. Bureaucrats in Washington pay state and local governments and private groups to staff and administer most federal programs.

For instance, Medicaid, the main federal health program for low-income citizens, is administered mainly by state agencies. The federal government has co-funded nonprofit groups to lead recovery efforts in the hurricane-ravaged Gulf Coast. At points during the second Gulf War, there were nearly as many for-profit workers as U.S. soldiers in Iraq.

The Canadian and Indian central governments each administer many policies via provincial or territorial governments; and every European government uses private contractors for at least some functions.

But most other democracies restrict and regulate outsourcing more than the United States does. For example, German law directs that all persons involved in administering national policies must be supervised directly by a government official.

And no other nation follows the American practice whereby government bureaucracies give tax-exempt organizations, including local faith-based groups, grants to administer myriad health and human services programs.

Many experts argue that outsourcing and proxy government have gone too far in this country; but none are sure whether or how it can be reined in, and most admit that public administration in other democracies is also far from perfect.

**Sources:** Donald F. Kettl, *The Next Government of the United States: Why Our Institutions Fail Us and How to Fix Them* (New York: W. W. Norton, 2008); Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* (Cambridge, UK: Cambridge University Press, 2007); John J. Dilulio, Jr., "Government by Proxy: A Faithful Overview," *Harvard Law Review* (March 2003): 1271–84.

influential voters. Silly as the rules for ashtrays may sound, they were written so that the government could say it had an "objective" standard for buying ashtrays. If it simply had bought ashtrays at a department store the way ordinary people do, it would have risked being accused by Ashtray Company One of buying trays from its competitor, Ashtray Company Two, because of political favoritism.

The rivalry between the president and Congress for control of the bureaucracy makes bureaucrats nervous about irritating either branch, and so they issue rules designed to avoid getting into trouble, even if these rules make it hard to do their job. Matters become even worse during periods of divided government when different parties control the White House and Congress. As we saw in Chapter 14, divided government may not have much effect on *making* policy, but it can have a big effect on *implementing* it. Presidents of one party have tried to increase political control over the bureaucracy ("executive micromanagement"), and Congresses of another party have responded by increasing the number of investigations and detailed rule-making ("legislative micromanagement"). Divided government intensifies the cross-fire between the executive and legislative branches, making bureaucrats dig into even deeper layers of red tape to avoid getting hurt.

This does not mean that reform is impossible, only that it is very difficult. For example, despite a lack of clear-cut successes in other areas, the NPR's procurement reforms stuck; government agencies can now buy things that cost as much as \$100,000 without following any complex regulations. Still, the main effect of the NPR, the GPRA, and the PART was to get federal agencies collecting far more information than in the past concerning what they do, without, however, using the information to improve the way they do it.<sup>31</sup>

It might be easier to make desirable changes if the bureaucracy were accountable to only one master—say, the president—instead of to several. But that situation, which exists in many parliamentary democracies, creates its own problems. When the bureaucracy has but one master, it often ends up having none; it becomes so powerful that it controls the prime minister and no longer listens to citizen complaints. A weak, divided bureaucracy such as that in the United States may strike us as inefficient, but that very inefficiency may help to protect our liberties.



**IMAGE 11-4** When the Ebola virus surfaced in the United States in 2014, first responders wore full biohazard suits to disinfect possible contaminated areas.



## LEARNING OBJECTIVES .....

### 11-1 Discuss the unique features of the American federal bureaucracy.

A bureaucracy is a large, complex organization composed of appointed officials. American bureaucracy is distinctive in three ways: political authority over the bureaucracy is shared by several institutions; most national government agencies share their functions with state and local government agencies; and government agencies are scrutinized closely and challenged frequently by both individuals and nongovernmental groups.

### 11-2 Explain the evolution of the federal bureaucracy.

The Constitution made no provision for an administrative system other than to allow the president to appoint, with the advice and consent of the Senate, ambassadors, Supreme Court judges, and “all other officers ... which shall be provided by law.” By the early 20th century, however, Washington’s role in making, administering, and funding public policies had already grown far beyond what the Framers had contemplated. Two world wars, the New Deal, and the Great Society each left the government with expanded powers that required new batteries of administrative agencies to exercise them.

Still, the president, cabinet secretaries, and thousands of political appointees are ultimately their bosses. Congress and the courts have ample, if imperfect, means of checking and balancing even the biggest bureaucracy, old or new.

### 11-3 Summarize how the federal bureaucracy functions today.

Today, the federal bureaucracy is as vast as most people’s expectations about Washington’s responsibility for every public concern one can name. It is the appointed officials, the bureaucrats—not the elected officials or policymakers—who command the troops, deliver the mail, audit the tax returns, run the federal prisons, decide who qualifies for public assistance, and do countless other tasks. Unavoidably, many bureaucrats exercise discretion in deciding what public laws and regulations mean and how to apply them.

Discretionary authority refers to the extent to which appointed bureaucrats can choose courses of action and make policies not spelled out in advance by laws. It is impossible for Congress to specify every last detail regarding how to implement a law it passes.

Many laws are administered by persons with special information and expertise, and many private citizens administer public laws by working as government contractors or grantees.

### 11-4 Discuss checks on and problems with the federal bureaucracy, and possibilities for reform.

Congress exerts control over the bureaucracy in many different ways. It decides whether an agency may exist and how much money an agency spends. It can hold oversight hearings and launch investigations into just about any aspect of agency decision making or operations it chooses. And traditionally it has enjoyed wide latitude from the president in exercising its oversight functions.

There have been numerous efforts to make the bureaucracy work better and cost less, including 11 presidential or other major commissions in the 20th century. Among the latest was the National Performance Review (NPR), popularly called the plan to “reinvent government.” Vice President Gore led the NPR during the two terms of the Clinton administration. The NPR was predicated on the view that bureaucracy had become too centralized, too rule-bound, too unconcerned with program results, and too preoccupied with avoiding scandal.

In the end, the NPR produced certain money-saving changes in the federal procurement process (how government purchases goods and services from private contractors), and it also streamlined parts of the federal personnel process (how Washington hires career employees). Most experts, however, gave the NPR mixed grades. The Bush administration abolished the NPR but began the Performance Assessment Rating Tool (PART). Most experts judged the PART to be only mildly successful.

All large organizations, including business firms, have some complex rules and procedures, or red tape. Some red tape in government agencies is silly and wasteful (or worse), but try imagining government without any red tape at all. Imagine no rules about hiring on the basis of merit, no strict financial accounting procedures, and no regulations concerning citizen access to information or public record-keeping. As Yale political scientist Herbert Kaufman once quipped, one citizen’s “red tape” often is another’s “treasured procedural safeguard.”

## TO LEARN MORE .....

For addresses and reports of various cabinet departments: [www.whitehouse.gov](http://www.whitehouse.gov)

Documents and bulletin boards:  
<http://fedworld.ntis.gov>

National Partnership for Reinventing Government:  
<http://govinfo.library.unt.edu/npr/index.htm>

### A Few Specific Websites of Federal Agencies:

Department of Defense: [www.defenselink.mil](http://www.defenselink.mil)

Department of Education: [www.ed.gov](http://www.ed.gov)

Department of Health and Human Services:  
[www.dhhs.gov](http://www.dhhs.gov)

Department of State: [www.state.gov](http://www.state.gov)

Federal Bureau of Investigation: [www.fbi.gov](http://www.fbi.gov)

Department of Labor: [www.dol.gov](http://www.dol.gov)

Burke, John P. *Bureaucratic Responsibility*. Baltimore: Johns Hopkins University Press, 1986. Examines the problem of individual responsibility—for example, when to be a whistle blower—in government agencies.

Downs, Anthony. *Inside Bureaucracy*. Boston: Little, Brown, 1967. An economist's explanation of why bureaucrats and bureaus behave as they do.

Durant, Robert F., ed. *The Oxford Handbook of American Bureaucracy*. New York: Oxford University Press, 2010. Thirty-three academic essays covering just about every facet of the subject.

Halperin, Morton H. *Bureaucratic Politics and Foreign Policy*. Washington, D.C.: Brookings Institution, 1974. Insightful account of the strategies by which diplomatic and military bureaucracies defend their interests.

Heclo, Hugh. *A Government of Strangers*. Washington, D.C.: Brookings Institution, 1977. Analyzes how political appointees attempt to gain control of the Washington bureaucracy and how bureaucrats resist those efforts.

Kettl, Donald F. *Government by Proxy*. Washington, D.C.: Congressional Quarterly Press, 1988. An account of how the federal government pays others to staff and run its programs.

Kettl, Donald F. *The Next Government of the United States: Why Our Institutions Fail Us and How to Fix Them*. New York: W. W. Norton, 2008. A masterful study of how proxy government functions and often fails today, and what might be done to remedy its worst failures.

Moore, Mark H. *Creating Public Value: Strategic Management in Government*. Cambridge, MA: Harvard University Press, 1995. A thoughtful account of how wise bureaucrats can make government work better.

Parkinson, C. Northcote. *Parkinson's Law*. Boston: Houghton Mifflin, 1957. Half-serious, half-humorous explanation of why government agencies tend to grow.

Wilson, James Q. *Bureaucracy: What Government Agencies Do and Why They Do It*. New York: Basic Books, 1989. A comprehensive review of what we know about bureaucratic behavior in the United States.



PAUL J. RICHARDS/Getty Images

## CHAPTER 12

# The Judiciary

### LEARNING OBJECTIVES

- 12-1** Explain the concept of judicial review.
- 12-2** Summarize the development of the federal courts.
- 12-3** Discuss the structure, jurisdiction, and operation of the federal courts.
- 12-4** Explain how the federal courts exercise power and the checks on judicial power.



## THEN

When the states were debating the ratification of the Constitution, Alexander Hamilton wrote in *Federalist* No. 78 that the new system of federal courts would be “the least dangerous” branch of government because, unlike the president, it would not command the sword and, unlike Congress, it would not control the purse strings. The courts, he argued, could take “no active resolution whatever.” Nowhere in the Constitution was the Supreme Court given the right to declare laws of Congress or decisions of the president to be unconstitutional, though Hamilton argued that such a power was necessary. That document was our fundamental law and expressed the will of the people, and so it ought to be preferred to a law passed by Congress if there were an “irreconcilable variance between the two.”

## NOW

Within a few years after the Constitution was ratified, the Supreme Court took Hamilton’s position by asserting that the Court could decide if a law was unconstitutional. A dozen years later, the same Court said that Congress could not only pass laws on the basis of powers given it explicitly by the Constitution, but also do things that were “necessary and proper” in order to implement those powers. By the middle of the 19th century, the Supreme Court had begun to declare many federal and scores of state laws to be unconstitutional.

As a result of its newfound powers, justices began serving on the Supreme Court for much longer periods. The 11 justices nominated by President George Washington served seven years on average, while the five nominated by President Andrew Jackson 40 years later served 20 years on average. The Court had become not the least dangerous branch, but a powerful one.

In time, the identity of the justices became an important political issue. Until recently, most justices were confirmed by the Senate, and from 1947 to 1985, almost all persons nominated to be a federal appeals court judge were approved. But of late, these nominations have had a less certain reception in the Senate. When President Ronald Reagan nominated Antonin Scalia for the Supreme Court, he was confirmed by the Senate in 1986 by a vote of 98–0. But one year later, when President Reagan nominated Robert Bork, Bork was rejected by the Senate. Four years after that, Clarence Thomas barely survived a confirmation vote (52 to 48). In 2006, President George W. Bush’s nominee Samuel Alito won confirmation by a vote of 58 to 42 after Senate Democrats tried to block the vote by means of a filibuster. Both of President Barack Obama’s first-term nominees were confirmed—Sonia Sotomayor’s nomination was approved in 2009 by a vote of 68 to 31, and Elena Kagan’s nomination was approved in 2010 by a vote of 63 to 37—but in each case, many Republicans voted against the nominee. And after Justice Scalia’s death in early 2016, Republican Majority Leader Mitch McConnell declared that the Senate would not hold hearings for the Obama administration’s nominee, U.S. Appeals Court Judge Merrick Garland, but instead would wait for the next president to make a nomination.

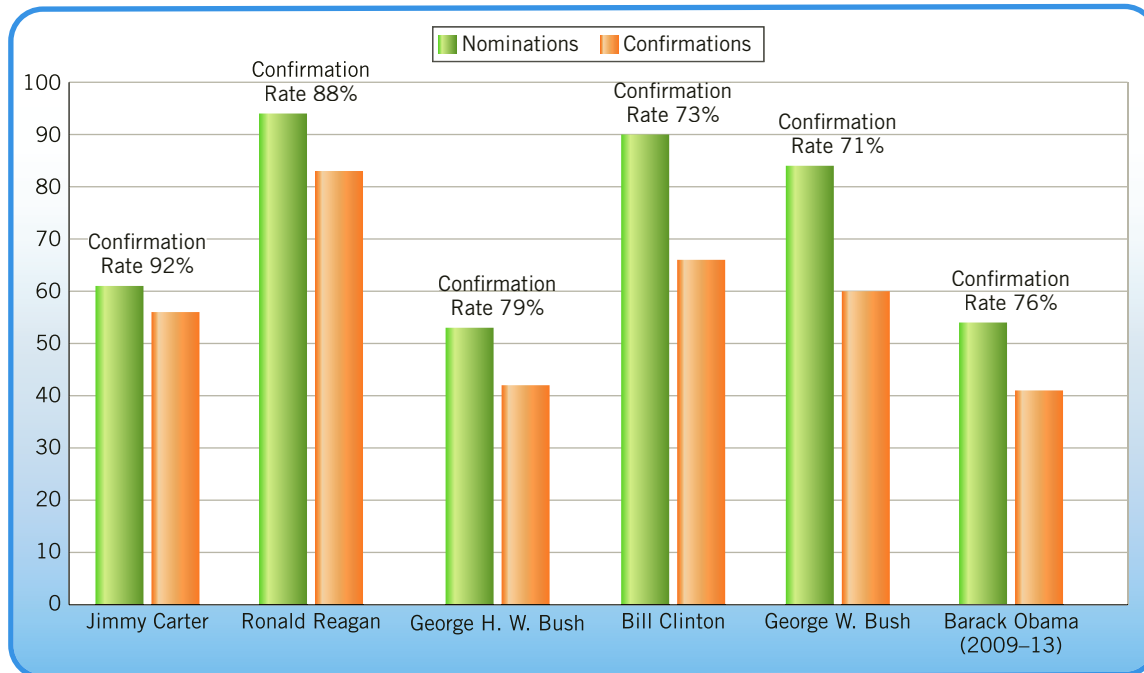
Beyond the Supreme Court, the percentage of nominees to federal appeals courts who are confirmed has dropped sharply. From 1945 until 1970, almost every appeals court nominee was confirmed; but by 1995 only about half got through the Senate and by 2000 it was less than 40 percent. Figure 12-1 shows a decline in the confirmation rate for the federal appeals courts, from 92 percent in the Carter administration to 71 percent in the George W. Bush administration. From 2009 until 2013, just over three-quarters of Obama’s federal appeals court nominees were confirmed.

Nominees to the federal district court are much less controversial than nominees to the federal appeals courts, because the president rarely nominates for a federal district court someone who is not known to and supported by the nominee’s two home state senators. Still, the 78 percent confirmation rate for President Obama’s nominees to the federal district courts was well below the 95 percent confirmation rate for the preceding administration.<sup>1</sup> Also, as Figure 12-2 shows, over the last three presidencies, the average number of days between a nominee’s Senate hearings and his or her confirmation has increased steeply for both federal appeals court nominees and for federal district court nominees.

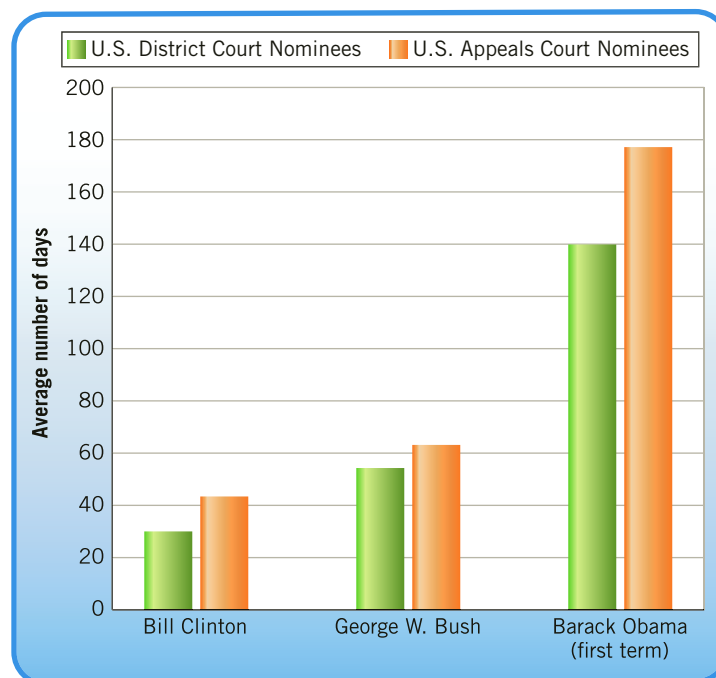
Why the changes? One reason is that the federal judiciary has played an increasingly important role in making public policy. It, and not Congress, decided that abortions should be legal, settled the closely contested 2000 presidential election, and allowed private homes to be seized in order to build a residential hotel and other private structures aimed at affluent clientele. In these and many other cases, the federal courts have become major political actors; as a result, Congress has become concerned about who will be federal judges. Especially during certain periods of divided government (see Chapter 10), the increased partisan polarization in Congress (see Chapter 9) has made its mark on the Senate’s confirmation process. For example, during President Bill Clinton’s first two years in office, a period of unified government, 86 percent of his nominees for the U.S. Court of Appeals were confirmed; however, during his second two years in office, a period of divided government, the confirmation rate dropped to 55 percent.<sup>2</sup>

As federal judges make more policy decisions—and as partisan rancor over those decisions rises—the process by which the Senate considers nominees for the federal bench has become longer, more ideologically charged, and less certain to result in confirmations. By long-standing tradition, senators from the home state of an appeals court nominee are allowed to file a private objection (called registering a negative “blue slip” complaint). If filed by a Judiciary Committee member, this will prevent a hearing on the nominee from taking place. Sometimes these blue slips indicate that a senator doesn’t like the nominee’s political views, but other times it can mean that the senator is blocking a judicial appointment as a way of inducing the president to do something he or she wants on a totally unrelated matter. Over the last three presidencies, that tradition has been used ever more as just another tool of partisan politics.



**FIGURE 12-1** Judicial Nominations and Confirmations, U.S. Courts of Appeal

**Source:** Adapted from Russell Wheeler, *Judicial Nominations and Confirmations in the 11th Senate and What to Look for in the 112th*, Governance Studies, Brookings Institution, January 4, 2011, p. 2.

**FIGURE 12-2** Federal Court Nominees, Time From Hearings to Confirmation

**Source:** Adapted from Russell Wheeler, *Judicial Nominations and Confirmations in Obama's First Term*, Governance Studies, Brookings Institution, December 13, 2012, p. 9.

## 12-1 Judicial Review

One aspect of the federal courts' power is **judicial review**—the right of the federal courts to declare laws of Congress and acts of the executive branch void and unenforceable if they are judged to be in conflict with the Constitution. Since 1789, the Supreme Court has declared more than 160 federal laws to be unconstitutional. In Britain, by contrast, Parliament is supreme. The UK Supreme Court, established quite recently by the Constitutional Reform Act of 2005, started work in 2009 and is much more limited in its powers of judicial review. It cannot overturn primary legislation made by Parliament. As the second earl of Pembroke supposedly said, "A parliament can do anything but make a man a woman and a woman a man." All that prevents Parliament from acting contrary to the (unwritten) constitution of Britain are the consciences of its members and the opinions of the citizens.

About 60 nations do have something resembling judicial review, but in only a few cases does this power mean much in practice. Where it means something—in Australia, Canada, Germany, India, and some other nations—one finds a stable, federal system of government with a strong tradition of an independent judiciary.<sup>3</sup> Some other nations—France, for example—have special councils, rather than courts, that under certain circumstances can decide that a law is not authorized by the constitution.

Judicial review is the federal courts' chief weapon in the system of checks and balances that the American government is based upon. Today, few people would deny to the courts the right to decide that a legislative or executive act is unconstitutional, though once that right was controversial. What remains controversial is the method by which such review is conducted.

There are two competing views, each pressed ardently during the fight to confirm Clarence Thomas. The first holds that judges should only judge—that is, they should confine themselves to applying those rules stated in or clearly implied by the language of the Constitution. This often is called the **judicial restraint approach**, or **strict-constructionist approach**. The other argues that judges should discover the general principles underlying the Constitution and its often-vague language, amplify those principles on the basis of some moral or economic philosophy, and apply them to cases. This is sometimes called the **activist approach**.

Note that the difference between activist and strict-constructionist judges is not necessarily the same as the difference between liberals and conservatives. Judges can be political liberals and still believe they are bound by the language of the Constitution. A liberal justice, Hugo Black, once voted to uphold a state law banning birth control because nothing in the Constitution prohibited such a law. Or judges can be conservative and still think they have a duty to use their best judgment in deciding what is good public policy. Rufus Peckham, one such conservative, voted to overturn a state law setting maximum hours of work because he believed the Fourteenth Amendment guaranteed something

called "freedom of contract," even though those words are not in the amendment. Seventy years ago, judicial activists tended to be conservatives and strict-constructionist judges tended to be liberals; today the opposite is more often the case.

## 12-2 The Development of the Federal Courts

Most of the Founders probably expected the Supreme Court to have the power of judicial review (though they did not say that explicitly in the Constitution), but they did not expect federal courts to play so large a role in making public policy. The traditional view of civil courts was that they judged disputes between people who had direct dealings with each other—they had entered into a contract, for example, or one had dropped a load of bricks on the other's toe—and

### **judicial review**

The power of courts to declare laws unconstitutional.

### **judicial restraint approach**

The view that judges should decide cases strictly on the basis of the language of the laws and the Constitution.

### **activist approach**

The view that judges should discern the general principles underlying laws or the Constitution and apply them to modern circumstances.

**TABLE 12-1** Chief Justices of the United States

Chief Justice	Appointed by	Years of Service
John Jay	Washington	1789–1795
Oliver Ellsworth	Washington	1796–1800
John Marshall	Adams	1801–1835
Roger B. Taney	Jackson	1836–1864
Salmon P. Chase	Lincoln	1864–1873
Morrison R. Waite	Grant	1874–1888
Melville W. Fuller	Cleveland	1888–1910
Edward D. White	Taft	1910–1921
William Howard Taft	Harding	1921–1930
Charles Evans Hughes	Hoover	1930–1941
Harlan Fiske Stone	F. Roosevelt	1941–1946
Fred M. Vinson	Truman	1946–1953
Earl Warren	Eisenhower	1953–1969
Warren E. Burger	Nixon	1969–1986
William H. Rehnquist	Reagan	1986–2005
John G. Roberts, Jr.	Bush	2005–present

**Note:** Omitted is John Rutledge, who served for only a few months in 1795 and who was not confirmed by the Senate.

decided which of the two parties was right. The court then supplied relief to the wronged party, usually by requiring the other person to pay him or her money (“damages”).

This traditional understanding was based on the belief that judges would find and apply existing law. The purpose of a court case was not to learn what the judge believes, but what the law requires. The later rise of judicial activism occurred when judges questioned this traditional view and argued instead that judges do not merely find the law, they make the law.

The view that judges interpret the law, not make policy, made it easy for the Founders to justify the power of judicial review. It also led them to predict that the courts would play a relatively neutral, even passive, role in public affairs. Alexander Hamilton, writing in *Federalist* No. 78, described the judiciary as the branch “least dangerous” to political rights. The president is commander-in-chief and thus holds the “sword of the community”; Congress appropriates money and thus “commands the purse” as well as decides what laws shall govern. But the judiciary “has no influence over either the sword or the purse” and “can take no active resolution whatever.” It has “neither force nor will but merely judgment,” and thus is “beyond comparison the weakest of the three departments of power.” As a result, “liberty can have nothing to fear from the judiciary alone.” Hamilton went on to state clearly that the Constitution intended to give to the courts the right to decide whether a law is contrary to the Constitution. But this authority, he explained, was designed not to enlarge the power of the courts but to confine that of the legislature.

Obviously, things have changed since Hamilton’s time. The evolution of the federal courts, especially the Supreme Court, toward the present level of activism and influence has been shaped by the political, economic, and ideological forces of three historical eras. From 1787 to 1865, the great issues were nation-building, the legitimacy of the federal government, and slavery; from 1865 to 1937, the great issue was the relationship between the government and the economy; from 1938 to the present, the major issues confronting the Court have involved personal liberty and social equality, and the potential conflict between the two. In the first period, the Court asserted the supremacy of the federal government; in the second, it placed important restrictions on the powers of that government; and in the third, it enlarged the scope of personal freedom and narrowed that of economic freedom.

## National Supremacy and Slavery

“From 1789 until the Civil War, the dominant interest of the Supreme Court was in that greatest of all the questions left unresolved by the Founders—the nation-state relationship.”<sup>4</sup> The answer the Court gave, under the leadership of Chief Justice John Marshall, was that national law was in all instances the dominant law, with state law having to give way, and that the Supreme Court had the power to decide what the Constitution meant. In two cases of enormous importance—*Marbury v. Madison* in 1803 and *McCulloch v. Maryland* in 1819—the Court, in decisions written by Marshall, held that the Supreme Court could declare an act of Congress unconstitutional; that the power granted by the Constitution to the

federal government flows from the people and thus should be generously construed (and thus any federal laws that are “necessary and proper” to the attainment of constitutional ends are permissible); and that federal law is supreme over state law, even to the point that a state may not tax an enterprise (such as a bank) created by the federal government.<sup>5</sup>

The supremacy of the federal government was reaffirmed by other decisions as well. In 1816, the Supreme Court rejected the claim of the Virginia courts that the Supreme Court could not review the decisions of state courts. The Virginia courts were ready to acknowledge the supremacy of the U.S. Constitution but believed they had as much right as the U.S. Supreme Court to decide what the Constitution meant. The Supreme Court felt otherwise; in this case and another like it, the Court asserted its own broad powers to review any state court decision if that decision seemed to violate federal law or the federal Constitution.<sup>6</sup>

The power of the federal government to regulate commerce among the states was also established. When New York gave to Robert Fulton, the inventor of the steamboat, the monopoly right to operate his steamboats on the rivers of that state, the Marshall Court overturned the license because the rivers connected New York and New Jersey—and thus trade on those rivers would involve interstate commerce, where federal law was supreme. Since there was a conflict—federal law on the books, the state law was void.<sup>7</sup>

All of this may sound rather obvious to us today, when the supremacy of the federal government is largely unquestioned. In the early 19th century, however, these decisions were almost revolutionary. The Jeffersonian Republicans were in power and had become increasingly devoted to states’ rights; they were aghast at the Marshall decisions. President Andrew Jackson attacked the Court bitterly for defending the right of the federal government to create a national bank and for siding with the Cherokee Indians in a dispute with Georgia. In speaking of the latter case, Jackson is supposed to have remarked, “John Marshall has made his decision; now let him enforce it!”<sup>8</sup>

Though Marshall seemed to have secured the supremacy of the federal government over the state governments, another even more divisive issue had arisen: slavery. Roger B. Taney succeeded Marshall as chief justice in 1836. President Jackson chose him deliberately because Taney was an advocate of states’ rights, and he began to chip away at federal supremacy, upholding state claims that Marshall would have set aside. But the decision for which Taney is famous—or infamous—came in 1857 when, in the *Dred Scott* case, he wrote perhaps the most disastrous judicial opinion ever issued. A slave, Dred Scott, had been taken by his owner to a territory where slavery was illegal under federal law (near what is now St. Paul, Minnesota). Scott claimed that since he had resided in a free territory, he was now a free man. Taney held that Negroes were not citizens of the United States and could not become so, and that the federal law—the Missouri Compromise—prohibiting slavery in Northern territories was unconstitutional.<sup>9</sup> The public outcry against this view was enormous, and the Court and Taney were discredited in the North, at least. Ultimately, the Civil War was fought over what the Court mistakenly had assumed was a purely legal question.

## Government and the Economy

The supremacy of the federal government may have been established by John Marshall and the Civil War, but the scope of the powers of that government or even of the state governments was still to be defined. During the period from the end of the Civil War to the early years of the New Deal, the dominant issue faced by the Supreme Court was deciding when the economy would be regulated by the states and when by the nation.

The Court revealed a strong though not inflexible attachment to private property. In fact, that attachment had always been there; the Founders thought political and property rights were inextricably linked, and Marshall certainly supported the sanctity of contracts. But now, with the muting of the federal supremacy issue and the rise of a national economy with important unanticipated effects, the property question became dominant. The Court developed the view that the Fourteenth Amendment—adopted in 1868 primarily to protect African American claims to citizenship from hostile state action—also protected private property and the corporation from unreasonable state action. The crucial phrase was this: no state shall “deprive any person of life, liberty, or property, without due process of law.” Once it became clear that a “person” could be a firm or a corporation as well as an individual, business and industry began to flood the courts with cases challenging various government regulations.

The Court quickly found itself in a thicket; it began ruling on the constitutionality of virtually every effort by any government to regulate any aspect of business or labor, and its workload rose sharply. Judicial activism was born in the 1880s and 1890s as the Court set itself up as the arbiter of what kind of regulation was permissible. In the first 75 years of this country’s history, only two federal laws were held to be unconstitutional; in the next 75 years, 71 were.<sup>10</sup> Of the roughly 1,300 state laws held to be in conflict with the federal Constitution since 1789, about 1,200 were overturned after 1870. In one decade alone—the 1880s—five federal and 48 state laws were declared unconstitutional.

Many of these decisions provided clear evidence of the Court’s desire to protect private property: it upheld the use of injunctions to prevent labor strikes,<sup>11</sup> struck down the federal income tax,<sup>12</sup> sharply limited the reach of the antitrust law,<sup>13</sup> restricted the powers of the Interstate Commerce Commission to set railroad rates,<sup>14</sup> prohibited the federal government from eliminating child labor,<sup>15</sup> and prevented the states from setting maximum hours of work.<sup>16</sup> In 184 cases between 1899 and 1937, the Supreme Court struck down state laws for violating the Fourteenth Amendment, usually by economic regulation.<sup>17</sup>

But the Court also rendered decisions that authorized various kinds of regulation. It allowed states to regulate businesses “affected with a public interest,”<sup>18</sup> changed its mind about the Interstate Commerce Commission and allowed it to regulate railroad rates,<sup>19</sup> upheld rules requiring railroads to improve their safety,<sup>20</sup> approved state antiliquor laws,<sup>21</sup> approved state mine safety laws,<sup>22</sup> supported state workers’ compensation laws,<sup>23</sup> allowed states to regulate fire-insurance rates,<sup>24</sup> and in time upheld a number of state laws

regulating wages and hours. Indeed, between 1887 and 1910, in 558 cases involving the Fourteenth Amendment, the Supreme Court upheld state regulations over 80 percent of the time.<sup>25</sup>

To characterize the Court as pro-business or anti-regulation is both simplistic and inexact. Characterizing it as supportive of the rights of private property, but unsure how to draw the lines that distinguish “reasonable” from “unreasonable” regulation is more accurate. Nothing in the Constitution differentiates reasonable from unreasonable regulation clearly, and the Court has been unable to invent a consistent principle of its own to make this determination. For example, what kinds of businesses are “affected with a public interest”? Grain elevators and railroads are, but are bakeries? Sugar refineries? Saloons? And how much of commerce is “interstate”—anything that moves? Or only something that actually crosses a state line (recall our discussion of this point in Chapter 3)? The Court found itself trying to make detailed judgments that it was not always competent to make, and to invent legal rules where no clear legal rules were possible.

In one area, however, the Supreme Court’s judgments were clear: the Fourteenth and Fifteenth Amendments were construed so narrowly as to give African Americans only the most limited benefits of their provisions. In a long series of decisions, the Court upheld segregation in schools and on railroad cars and permitted black people to be excluded from voting in many states.

## Government and Political Liberty

After 1936, the Supreme Court stopped imposing any serious restrictions on state or federal power to regulate the economy, leaving such matters in the hands of the legislatures. From 1937 to 1974, the Supreme Court did not overturn a single federal law designed to regulate business, but did overturn 36 congressional enactments that violated personal political liberties. It voided as unconstitutional laws that restricted freedom of speech,<sup>26</sup> denied passports to communists,<sup>27</sup> permitted the government to revoke a person’s citizenship,<sup>28</sup> withheld a person’s mail,<sup>29</sup> or restricted the availability of government benefits.<sup>30</sup>

This new direction began when one justice changed his mind, and it continued as the composition of the Court changed. At the outset of the New Deal, the Court was by a narrow margin dominated by justices who opposed the welfare state and federal regulation based on broad grants of discretionary authority to administrative agencies. President Franklin Roosevelt, who was determined to get just such legislation implemented, found himself powerless to alter the composition of the Court during his first term (1933–1937); because no justice died or retired, he had no vacancies to fill. After his overwhelming reelection in 1936, he moved to remedy this problem by “packing” the Court.

Roosevelt proposed a bill that would have allowed him to appoint one new justice for each justice over the age of 70 who refused to retire, up to a total membership of 15. Since at that time there were six men in this category on the Supreme Court, he would have been able to appoint six new justices—enough to ensure a comfortable majority





## LANDMARK CASES

### *Marbury v. Madison*

The story of *Marbury v. Madison* is often told, but it deserves another telling because it illustrates so many features of the role of the Supreme Court—how apparently small cases can have large results, how the power of the Court depends not simply on its constitutional authority but also on its acting in ways that avoid a clear confrontation with other branches of government, and how the climate of opinion affects how the Court goes about its task.

When President John Adams lost his bid for reelection to Thomas Jefferson in 1800, he—and all members of his party, the Federalists—feared that Jefferson and the Republicans would weaken the federal government and turn its powers to what the Federalists believed were wrong ends (states' rights, an alliance with the French, hostility to business). Feverishly, as his hours in office came to an end, Adams worked to pack the judiciary with 59 loyal Federalists by giving them so-called midnight appointments before Jefferson took office.

John Marshall, as Adams's secretary of state, had the task of certifying and delivering these new judicial commissions. In the press of business, he delivered all but 17; these he left on his desk for the incoming secretary of state, James Madison, to send out. Jefferson and Madison, however, were furious at Adams's behavior and refused to deliver the 17. William Marbury and three other Federalists who had been promised these commissions hired a lawyer and brought suit against Madison to force him to produce the documents. The suit requested the Supreme Court to issue a writ of mandamus (from the Latin, "we command") ordering Madison to do his duty. The right to issue such writs had been given to the Court by the Judiciary Act of 1789.

Marshall, the man who had failed to deliver the commissions to Marbury and his friends in the first place, had become the chief justice and was now in a position to decide the case. These days, justices who had been involved in an issue before it came to the Court probably would recuse themselves, but

Marshall had no intention of letting others decide this question. However, he faced not simply a partisan dispute over jobs but what nearly was a constitutional crisis. If he ordered the commission delivered, Madison might still refuse, and the Court had no way to compel Madison if he was determined to resist. The Court had no police force, whereas Madison had the support of the president of the United States. And if the order were given, whether or not Madison complied, the Jeffersonian Republicans in Congress would probably try to impeach Marshall. On the other hand, if Marshall allowed Madison to do as he wished, the power of the Supreme Court would be seriously reduced.

Marshall's solution was ingenious. Speaking for a unanimous Court, he announced that Madison was wrong to withhold the commissions, that courts could issue writs to compel public officials to do their prescribed duty—but that the Supreme Court had no power to issue such writs in this case because the law (the Judiciary Act of 1789) giving it that power was unconstitutional. The law said the Supreme Court could issue such writs as part of its "original jurisdiction"—that is, persons seeking such writs could go *directly* to the Supreme Court with their request (rather than go first to a lower federal court and then, if dissatisfied, appeal to the Supreme Court). Article III of the Constitution, Marshall pointed out, spelled out precisely the Supreme Court's original jurisdiction; it did not mention issuing writs of this sort and plainly indicated that on all matters not mentioned in the Constitution, the Court would have only appellate jurisdiction. Congress may not change what the Constitution says; hence, the part of the Judiciary Act attempting to do this was null and void.

As a result, the Supreme Court avoided a showdown with the Jeffersonians—Madison was not ordered to deliver the commissions—but the Court's power was unmistakably clarified and enlarged. As Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is." Furthermore, "a law repugnant to the Constitution is void."

supportive of his economic policies. A bitter controversy ensued. But before the bill could be voted on, the Supreme Court changed its mind, perhaps reacting to Roosevelt's big win in the 1936 election. Whereas it had been striking down several New Deal measures by votes of five to four, now it started approving them by the same vote. One justice, Owen Roberts, had switched his position. This was called the "switch in time that saved nine," but in fact Roberts had changed his mind *before* the FDR plan was announced.

The "Court-packing" bill was not passed, but it was no longer necessary. Justice Roberts had yielded before public opinion in a way that Chief Justice Taney a century earlier had not, thus forestalling an assault on the Court by the other

branches of government. Shortly thereafter, several justices stepped down, and Roosevelt was able to make his own appointments (he filled seven seats during his four terms in office). From then on, the Court turned its attention to new issues—political liberties and, in time, civil rights.

With the arrival of Chief Justice Earl Warren in 1953, the Court began its most active period yet. Activism now arose to redefine the relationship of citizens to the government and especially to protect the rights and liberties of citizens from governmental trespass. Although the Court has always seen itself as protecting citizens from arbitrary government, before 1937 that protection was of a sort that conservatives preferred; after 1937, it was of a kind that liberals preferred.



## CONSTITUTIONAL CONNECTIONS

### The “Exceptions” Clause

Article III, Section II of the Constitution provides that “the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.” In the 1868 case of *Ex Parte McCordle*, the Court unanimously agreed that the “Exceptions” clause gives Congress the power to restrict the Court’s appellate jurisdiction. Since then, many noted jurists and scholars have taken serious issue with that interpretation; but the prevailing view is that at least on an issue-by-issue basis, the exceptions clause gives Congress broad, if not unlimited, power to prohibit the federal courts, including the Supreme Court, from exercising judicial review.

Over the past several decades, each session of Congress has witnessed proposals to deny the federal courts appellate jurisdiction. There have been such proposals on abortion rights, busing to achieve racial balance in schools, school prayer, prisoners’ rights, same-sex marriage, and many other

issues. Some exception-clause proposals have become bills and made it into federal law; for example, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 prohibited the federal courts from hearing appeals regarding certain decisions by the U.S. Immigration and Naturalization Service.

Typically, however, even exception clause-related bills that come to a vote never make it into law. For example, in each of several post-2000 sessions, the House approved a bill prohibiting federal courts from exercising appellate jurisdiction in cases involving the invocation of “under God” in the Pledge of Allegiance. But none of these bills made it through the Senate. Likewise, in 2011, Rep. Ron Paul (R-TX) sponsored the Sanctity of Life Act, which would have stripped the federal courts of the authority to hear abortion cases; but that was just the latest in a series of such exception-clause bills on abortion that were much debated but never enacted.

### The Revival of State Sovereignty

For many decades, the Supreme Court allowed Congress to pass almost any law authorized by the Constitution, no matter how it affected the states. As we saw in Chapter 3, the Court long had held that Congress could regulate almost any activity if it affected interstate commerce, which in the Court’s opinion virtually every activity did. The states were left with few rights to challenge federal power. But since around 1992, the Court has backed away from this view. By narrow majorities, it has begun to restore the view that states have the right to resist some forms of federal action.

When Congress passed a bill that forbade anyone from carrying a gun near a school, the Court held that carrying guns did not affect interstate commerce, and so the law was invalid.<sup>31</sup> One year later, it struck down a law that allowed Indian tribes to sue the states in federal courts, arguing that Congress lacks the power to ignore the “sovereign immunity” of states—that is, the right, protected by the Eleventh Amendment, not to be sued in federal court. (It has since upheld that view in two more cases.) And the next year, it held that the Brady gun control law could not be used to require local law enforcement officers to do background checks on people trying to buy weapons.<sup>32</sup> These cases are all hints that the existence and powers of the states create some real limits to the supremacy of the federal government.

After the enactment of President Obama’s health care plan in 2010, several states argued that its requirement for everyone to purchase health insurance was unconstitutional. Some district courts agreed with the claims and others disagreed. The issue was whether Congress’s authority to levy taxes or to regulate interstate commerce gave it the right to require citizens to purchase a product. In addition, some state officials questioned the constitutionality of provisions that required state governments to expand health care coverage for low-income citizens via the federal-state Medicaid program or risk losing all existing federal funding for that program.

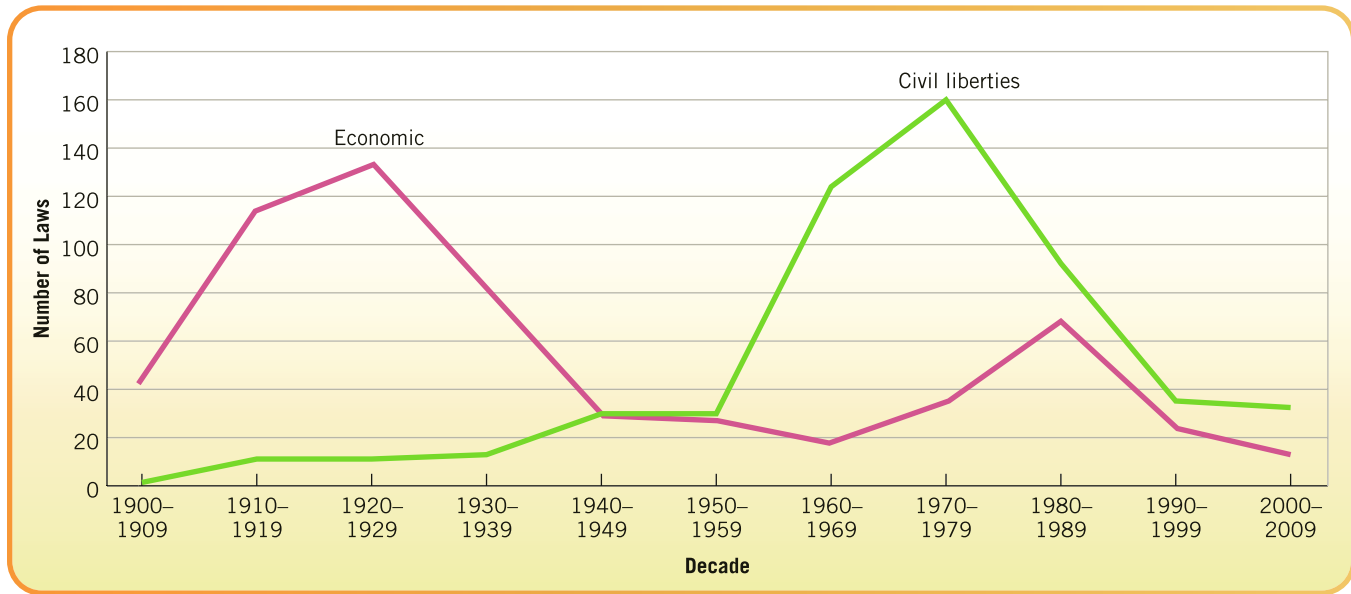
In *National Federation of Independent Business v. Sebelius* (2012), the Supreme Court decided these issues. It upheld the law’s “individual mandate” to purchase “minimum essential” health insurance, ruling that the monetary “penalty” to be levied by the Internal Revenue Service on anyone that does not purchase insurance as required by the law is tantamount to a constitutionally permissible federal “tax.”



## LANDMARK CASES

### Power of the Supreme Court

- ***Marbury v. Madison* (1803):** Upheld judicial review of congressional acts.
- ***Martin v. Hunter’s Lessee* (1816):** The Supreme Court can review the decisions of the highest state courts if they involve a federal law or the federal Constitution.
- ***McCulloch v. Maryland* (1819):** Ruled that creating a federal bank, though not mentioned in the Constitution, was a “necessary and proper” exercise of the government’s right to borrow money.
- ***Ex parte McCordle* (1869):** Allowed Congress to change the appellate jurisdiction of the Supreme Court.

**FIGURE 12-3** Economics and Civil Liberties Laws Overturned by the U.S. Supreme Court, by Decade, 1900–2012

**Note:** Civil liberties category does not include laws supportive of civil liberties. Laws include federal, state, and local.

**Source:** Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics, 2013–14* (Washington, D.C.: Congressional Quarterly, 2013), Figure 7.4.

**constitutional court** A federal court authorized by Article III of the Constitution that keeps judges in office during good behavior and prevents their salaries from being reduced. They are the Supreme Court (created by the Constitution) and appellate and district courts created by Congress.

**district courts** The lowest federal courts; federal trials can be held only here.

But in the same decision, the Court struck down the law's mandate that state governments expand Medicaid coverage by 2014, ruling that the provision "violates the Constitution" by impermissibly "threatening States with the loss of their existing" federal funding for the program. This part of the decision had important consequences for the law's implementation, and it could in time have far-reaching implications for how the federal courts handle cases concerning intergovernmental programs (see Chapter 3):

*Congress has no authority to order the States to regulate according to its instructions. Congress may*

*offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to comply.*

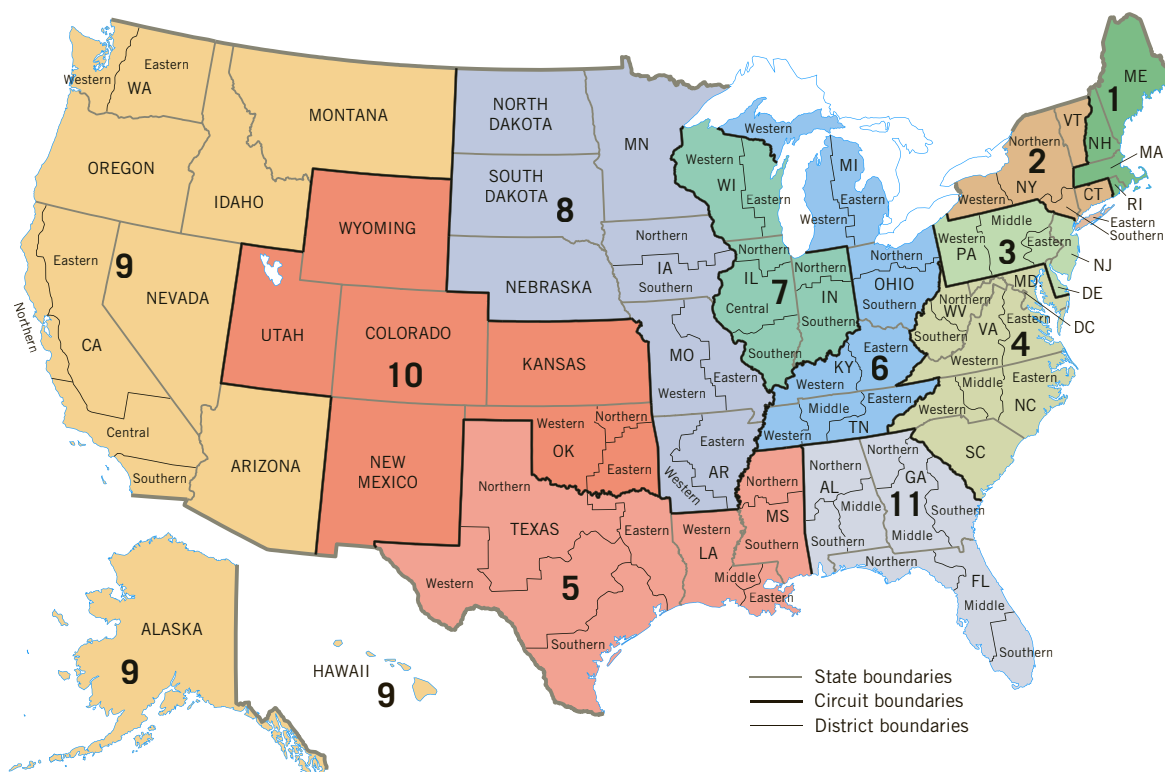
Debate over the federal government's appropriate role in health care continues. In 2015, the Supreme Court ruled 6-3 in *King v. Burwell* that the Affordable Care Act permits the federal government to provide subsidies for people to buy health insurance through the federal exchange if their

state does not have its own exchange for comparing and purchasing health-care plans. Opponents had insisted the law allowed subsidies only for plans purchased through state exchanges; if that view had prevailed, then more than six million Americans, in 34 states, likely would no longer be able to afford health insurance. By upholding subsidies for the federal exchange, the Court ensured the viability of the health-care law for the foreseeable future.<sup>33</sup>

## 12-3 The Structure, Jurisdiction, and Operation of the Federal Courts

The only federal court the Constitution requires is the Supreme Court, as specified in Article III. All other federal courts and their jurisdictions are creations of Congress. Nor does the Constitution indicate how many justices shall be on the Supreme Court (there were originally six, now there are nine) or what its appellate jurisdiction shall be.

Congress has created two kinds of lower federal courts to handle cases that need not be decided by the Supreme Court: constitutional and legislative courts. A **constitutional court** exercises the judicial powers found in Article III of the Constitution, and therefore its judges are given constitutional protection; they may not be fired (they serve during "good behavior"), nor may their salaries be reduced while they are in office. The most important of the constitutional courts are the **district courts** (a total of 94, with at least one in each state, the District of Columbia, and the commonwealth of

**MAP 12-1** U.S. District and Appellate Courts

**Source:** Administrative Office of the United States Courts.

**Note:** Washington, D.C., is in a separate court. Puerto Rico is in the first circuit; the Virgin Islands are in the third; Guam and the Northern Mariana Islands are in the ninth. The Court of Appeals for the Federal Circuit, located in Washington, D.C., is a Title 3 court that hears appeals regarding patents, trademarks, international trade, government contracts, and from civil servants who claim they were unjustly discharged.

Puerto Rico) and the **courts of appeals** (one in each of 11 regions, plus one in the District of Columbia and one federal circuit). There are also various specialized constitutional courts, such as the Court of International Trade.

**Legislative courts** are set up by Congress for some specialized purpose; they are staffed with people who have fixed terms of office and can be removed or have their salaries reduced. Legislative courts include the Court of Military Appeals and the territorial courts.

## Selecting Judges

Party background makes a difference in how judges behave. An analysis has been done of more than 80 studies of the link between party and either liberalism or conservatism among state and federal judges in cases involving civil liberties, criminal justice, and economic regulation. It shows that judges who are Democrats are more likely to make liberal decisions and Republican judges are more likely to make conservative ones.\* The party effect is not small.<sup>34</sup> We should not be surprised by this, since we have already seen that among political elites—and judges certainly are elites—party identification influences personal ideology.

\*A “liberal” decision is one that favors a civil right, a criminal defendant, or an economic regulation; a “conservative” one opposes the right or the regulation, or supports the criminal prosecutor.

But ideology does not entirely determine behavior. So many other things shape court decisions—the facts of the case, prior rulings by other courts, the arguments presented by lawyers—that there is no reliable way to predict how judges will behave in all matters. Presidents sometimes make the mistake of thinking they know how their appointees will behave, only to be surprised by the facts. Theodore Roosevelt appointed Oliver Wendell Holmes to the Supreme Court—only to remark later, after Holmes had voted in a way that Roosevelt did not like, that “I could carve out of a banana a judge with more backbone than that!” Holmes, who had plenty of backbone, said he did not “give a damn” what Roosevelt thought. Richard Nixon, an ardent foe of court-ordered school busing, appointed Warren Burger chief justice. Burger promptly sat down and wrote the opinion upholding busing. Another Nixon appointee, Harry Blackmun, wrote the opinion declaring that the right to an abortion was constitutionally protected.

### ***courts of appeals***

Federal courts that hear appeals from district courts; no trials.

### ***legislative courts***

Courts created by Congress for specialized purposes whose judges do not enjoy the protections of Article III of the Constitution.





Fotosearch/Archive Photos/Getty Images

**IMAGE 12-1** Louis Brandeis, creator of the “Brandeis Brief” that developed court cases based on economic and social more than legal arguments, became the first Jewish Supreme Court justice. He served on the Court from 1916 until 1939.

**litmus test** An examination of the political ideology of a nominated judge.

Federal judges tend to be white, male, and Protestant, and increasingly have been judges on some other court. There has been a decline in the proportion of Supreme Court

justices who come directly from private law practice; almost all have been promoted from a lower-ranking judgeship. For example, of the nine justices chosen by President Franklin D. Roosevelt, only two had been judges, while of the 12 nominated by presidents Ronald Reagan, George H. W. Bush, Bill Clinton, George W. Bush, and Barack Obama, 10 had been judges. Sex, race, and ethnicity also have become important factors in selecting judges. As is evident in Figure 12-4, Democratic presidents since President Lyndon Johnson have appointed higher percentages of women, blacks, and Hispanics than have Republican presidents, including a record-shattering fraction of female appointees during the Obama presidency.

## Senatorial Courtesy

In theory, the president nominates a “qualified” person to be a judge, and the Senate approves or rejects the nomination based on those “qualifications.” In fact, the tradition of *senatorial courtesy* gives heavy weight to the preferences of the senators from the state where a federal district judge

is to serve. Ordinarily, the Senate will not confirm a district court judge if the senior senator from the state where the court is located objects (if he is of the president’s party). The senator can exercise this veto power by means of the “blue slip”—a blue piece of paper on which the senator is asked to record his or her views on the nominee. A negative opinion, or even failure to return the blue slip, usually kills the nomination. This means that as a practical matter, the president nominates only persons recommended to him by that key senator. Someone once suggested that, at least with respect to district judges, the Constitution has been turned on its head. To reflect reality, he said, Article II, section 2, ought to read: “The senators shall nominate, and by and with the consent of the President, shall appoint” federal judges.

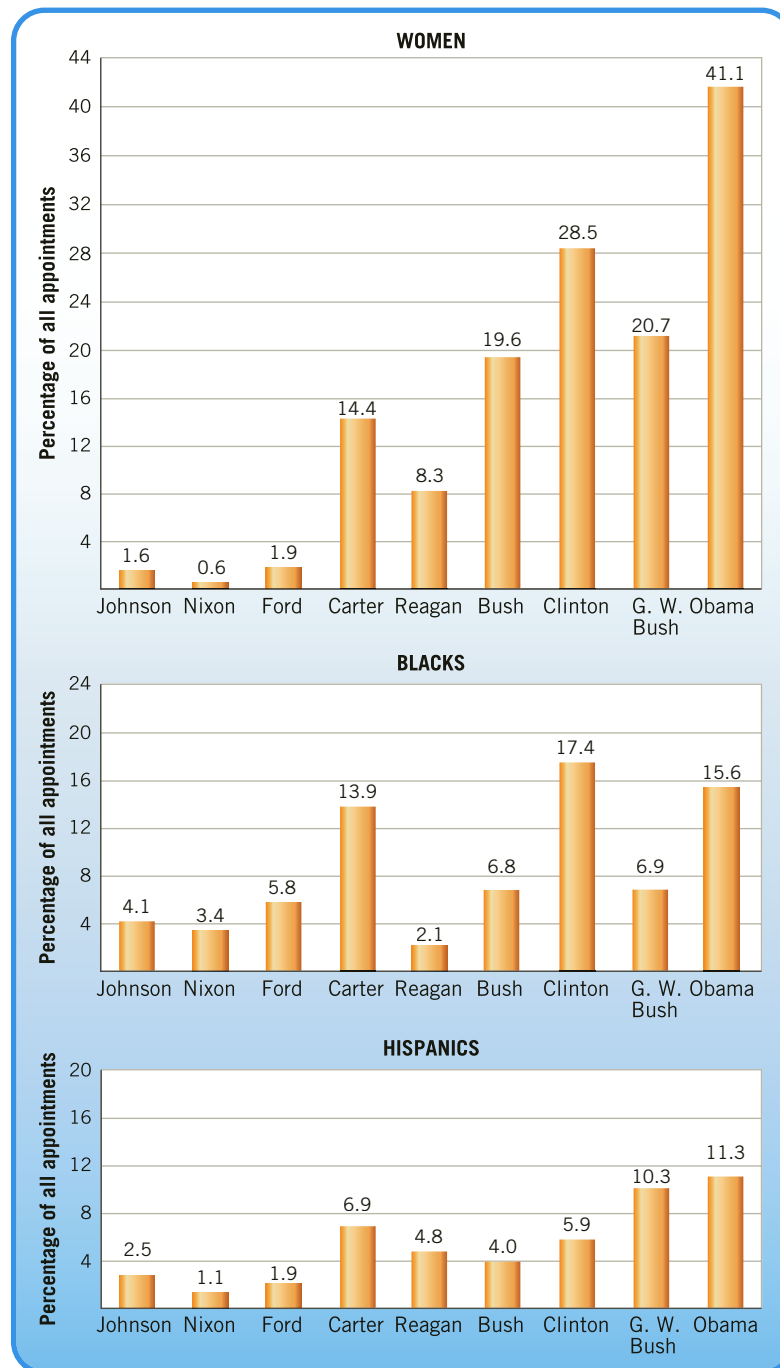
## The “Litmus Test”

Of late, presidents have tried to exercise more influence on the selection of federal district and appellate court judges by getting the Justice Department to find candidates that not only are supported by their party’s senators, but also reflect the political and judicial philosophy of the president. Presidents Carter, Clinton, and Obama sought out liberal, activist judges; Presidents Reagan, George H.W. Bush, and George W. Bush sought out conservative, strict-constructionist judges. The party membership of federal judges makes a difference in how they vote.<sup>35</sup>

Because different courts of appeals have different combinations of judges, some will be more liberal than others. For example, there are more liberal judges in the court of appeals for the ninth circuit (which includes most of the far western states) and more conservative judges in the fifth circuit (Texas, Louisiana, and Mississippi). The ninth circuit takes liberal positions, the fifth more conservative positions. Since the Supreme Court does not have time to settle every disagreement among appeals courts, different interpretations of the law may exist in different circuits. For instance, in the fifth circuit for a while it was unconstitutional for state universities to have affirmative action programs, but in the ninth circuit that was permitted.

These differences make some people worry about the use of a political **litmus test**—a test of ideological purity—in selecting judges. When conservatives are out of power, they complain about how liberal presidents use such a test; when liberals are out power, they complain about how conservative presidents use it. Many people would like to see judges picked on the basis of professional qualifications, without reference to ideology, but the courts are now so deeply involved in political issues that it is hard to imagine what an ideologically neutral set of professional qualifications might be.

A judicial nominee’s view on abortion is the chief motive for using the litmus test. Since it is easy to mount a filibuster and it takes 60 votes to end one, the nominee usually must be assured of 60 Senate votes to be confirmed. In theory, the Senate could adopt a rule preventing filibusters of nominations—but it never has. In 2005, a group of 14 senators, half from each party, agreed they would vote to block a filibuster on court nominees unless there were “extraordinary circumstances.” Called the Gang of Fourteen, this group made it

**FIGURE 12-4** Female and Minority Judicial Appointments, 1963–2013

**Source:** Updated from Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics, 2013–14* (Washington, D.C.: Congressional Quarterly, 2013), Table 7.5.

possible for several nominees (including Samuel Alito) to be confirmed even though they had fewer than 60 votes—but still, of course, more than 50. However, this truce did not endure. In 2013, led by Majority Leader Harry Reid, Senate Democrats changed chamber rules to permit majority votes for some judicial nominations, though not for the Supreme Court (see Chapter 9, “Floor Debate,” pp. 191–192). Republicans

unanimously opposed the change, as did a few Senate Democrats.<sup>36</sup> While the Republicans (who regained their Senate majority in 2014) so far have kept the rule change in place, its future remains to be seen.

The litmus test issue is of greatest importance in selecting Supreme Court justices. Here, there is no tradition of senatorial courtesy. The president takes a keen personal

**federal-question**

**cases** Cases concerning the Constitution, federal laws, or treaties.

**diversity cases**

Cases involving citizens of different states who can bring suit in federal courts.

interest in the choices and, of late, has sought to find nominees who share his philosophy. In the Reagan administration, there were bruising fights in the Senate over the nomination of William Rehnquist to be chief justice (he won) and Robert Bork to be an associate justice (he lost), with liberals pitted against conservatives. When President George H. W. Bush nominated David Souter, there

were lengthy hearings as liberal senators tried to pin down Souter's views on issues such as abortion. Souter refused to discuss matters on which he might later have to judge, however. Clarence Thomas, another Bush nominee, also tried to avoid the litmus test by saying he had not formed an opinion on prominent abortion cases. In his case, however, the litmus test issue was overshadowed by sensational allegations from a former employee, Anita Hill, that Thomas had sexually harassed her.

Of the 160 Supreme Court nominees presented to it, the Senate failed to confirm 36 of them. From the presidency of Harry Truman through the first term of President Barack Obama, 29 of 34 nominees have been confirmed. Of the five who were not confirmed, three (two nominated by President Richard Nixon, and one nominated by President Ronald Reagan) were voted on and rejected by a Senate majority, and two (one nominated by President Lyndon Johnson, and one nominated by President George W. Bush) withdrew before any Senate vote on the nomination. The reasons for rejecting a Supreme Court nominee are complex—each senator may have a different reason—but have involved such matters as the nominee's alleged hostility to civil rights, questionable personal financial dealings, a poor record as a lower-court judge, and Senate opposition to the nominee's political or legal philosophy. As we indicated earlier, nominations of district court judges are rarely defeated because typically no nomination is made unless the key senators approve in advance.

## The Jurisdiction of the Federal Courts

We have a dual court system—one state, one federal—and this complicates enormously the task of describing what kinds of cases federal courts may hear and how cases beginning in the state courts may end up before the Supreme Court. The Constitution (in Article III and the Eleventh Amendment) lists the kinds of cases over which federal courts have jurisdiction by implication; all other matters are left to state courts. Federal courts (see Figure 12-5) can hear all cases “arising under the Constitution, the laws of the United States, and treaties,” known as **federal-question cases**, and cases involving citizens of different states, called **diversity cases**.

Some kinds of cases can be heard in either federal or state courts. For example, if citizens of different states wish to sue one another and the matter involves more than \$75,000, they can do so in either a federal or a state court. Similarly, if someone robs a federally insured bank, he or she has broken both state and federal law and thus can be prosecuted in state or federal courts, or both. Lawyers have become quite sophisticated in deciding whether, in a given civil case, their clients will get better treatment in a state or federal court. Prosecutors often send a person who has broken both federal and state law to whichever court system is likelier to give the toughest penalty.

Sometimes defendants may be tried in both state and federal courts for the same offense. In 1992, four Los Angeles police officers accused of beating Rodney King were tried in a California state court and acquitted of assault charges. They were then prosecuted in federal court for violating King's civil rights. This time, two of the four were convicted. Under the dual sovereignty doctrine, state and federal authorities can prosecute the same person for the same conduct.

The Supreme Court has upheld this doctrine on two grounds. First, each level of government has the right to enact laws serving its own purposes.<sup>37</sup> As a result, federal civil rights charges could have been brought against the officers even if they had already been convicted of assault in state court (though as a practical matter this would have been unlikely). Second, neither level of government wants the other to be able to block prosecution of an accused person who has the sympathy of the authorities at one level. For example, when certain Southern state courts were in sympathy with whites who had lynched blacks, the absence of the dual sovereignty doctrine would have meant that a trumped-up acquittal in state court would have barred federal prosecution.

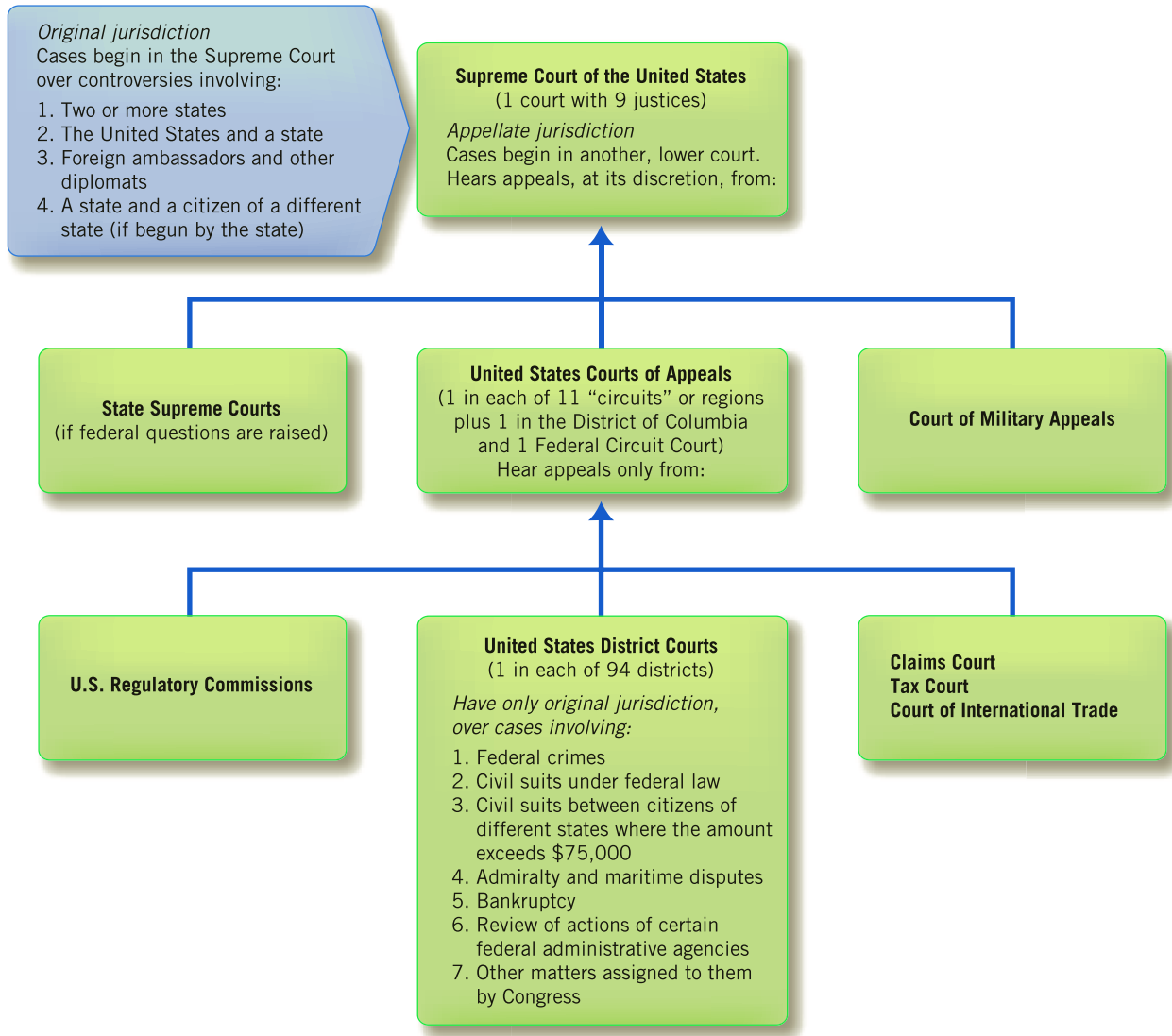
Furthermore, a matter that is exclusively within the province of a state court—for example, a criminal case in which the defendant is charged with violating only a state law—can be appealed to the U.S. Supreme Court under certain circumstances (described in the following text). Thus federal judges can overturn state court rulings even when they had no jurisdiction over the original matter. Under what circumstances this should occur has been the subject of long-standing controversy between the state and federal courts.

Some matters, however, are exclusively under the jurisdiction of federal courts. When a federal criminal law is broken—but not a state one—the case is heard in federal district court. If you wish to appeal the decision of a federal regulatory



Karen Bleier/AFP/Getty Images

**IMAGE 12-2** In 2009, Sonia Sotomayor answered questions in Senate confirmation hearings to become a Supreme Court justice.

**FIGURE 12-5** The Jurisdiction of the Federal Courts

agency, such as the Federal Communications Commission, you can do so only before a federal court of appeals. And if you wish to declare bankruptcy, you do so in federal court. If there is a controversy between two state governments—say, California and Arizona sue each other over which state is to use how much water from the Colorado River—the case can be heard only by the Supreme Court.

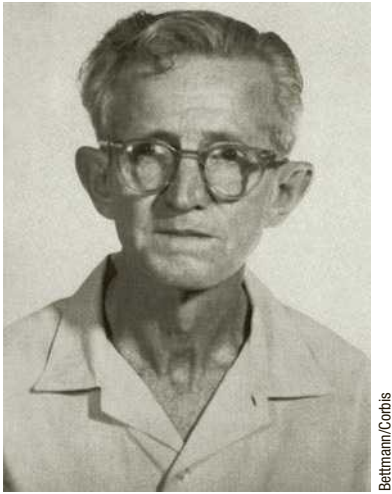
The vast majority of all cases heard by federal courts begin in the district courts. The volume of business there is huge. In 2009, the 667 district court judges received 276,397 cases (more than 400 per judge). Most of the cases heard in federal courts involve rather straightforward applications of law; few lead to the making of new public policy. Cases that do affect how the law or the Constitution is interpreted can begin with seemingly minor events. For example, a major broadening of the Bill of Rights—requiring for the first time that all accused persons in *state* as well as federal criminal

trials be supplied with a lawyer, free if necessary—began when impoverished Clarence Earl Gideon, imprisoned in Florida, wrote an appeal in pencil on prison stationery and sent it to the Supreme Court.<sup>38</sup>

The Supreme Court does not have to hear any appeal it does not want to hear. At one time, it was required to listen to certain appeals, but Congress has changed the law so that now the Court can pick the cases it wants to consider. It does this by issuing a **writ of certiorari**. *Certiorari* is a Latin word meaning, roughly, “made more certain”; lawyers and judges have abbreviated it to *cert*. It works this way: the Court considers all the petitions it receives to review lower-court decisions; if four justices agree to hear a case, *cert* is issued and the case is scheduled for a hearing.

**writ of certiorari** An order by a higher court directing a lower court to send up a case for review.





**IMAGE 12-3** Clarence Earl Gideon studied law books while in prison so that he could write an appeal to the Supreme Court. His handwritten letter asked that his conviction be set aside because he had not been provided with an attorney. His appeal was granted.

### ***in forma pauperis***

A method whereby a poor person can have his or her case heard in federal court without charge.

In deciding whether to grant certiorari, the Court tries to reserve its time for cases, decided by lower federal courts or by the highest state courts, in which a significant federal or constitutional question has been raised. For example, the

Court often will grant certiorari when one or both of the following is true:

- Two or more federal circuit courts of appeals have decided the same issue in different ways.
- The highest court in a state has held a federal or state law to be in violation of the Constitution or has upheld a state law against the claim that it is in violation of the Constitution.

In a typical year, the Court may consider more than 7,000 petitions asking it to review decisions of lower or state courts. It rarely accepts more than about 100 for full review.

In exercising its discretion in granting certiorari, the Supreme Court is on the horns of a dilemma. If it grants it frequently, it will be inundated with cases; as it is, the Court's workload has quintupled in the last 50 years. If, on the other hand, the Court grants certiorari only rarely, then the federal courts of appeals have the last word on the interpretation of the Constitution and federal laws. Since there are 12 federal courts of appeals, staffed by about 167 judges, they may well be in disagreement. In fact, this has already happened; because the Supreme Court reviews only about 1 or 2 percent of appeals court cases, applicable federal law may be different in different parts of the country.<sup>39</sup> One proposal to deal with this dilemma is to devote the Supreme Court's time entirely to major questions of constitutional interpretation and to create a national court of appeals that would ensure that the 12 circuit courts of appeals are producing uniform decisions.<sup>40</sup>

Because the Supreme Court has a heavy workload, the influence wielded by law clerks has grown. These clerks—recent graduates of law schools hired by the justices—play a big role in deciding which cases should be heard under a writ of certiorari. Indeed, the clerks draft some of the opinions written by the justices. Since the reasons for a decision may be as important as the decision itself, and since the clerks sometimes create those reasons, the power of the clerks can be significant.

## Getting to Court

In theory, the courts are the great equalizer in the federal government. To use the courts to settle a question, or even to fundamentally alter the accepted interpretation of the Constitution, one need not be elected to any office, have access to the mass media, be a member of an interest group, or be otherwise powerful or rich. Once the contending parties are before the courts, they are legally equal.

It is too easy to believe this theory uncritically or to dismiss it cynically. In fact, it is hard to get before the Supreme Court; it rejects over 96 percent of the applications for certiorari that it receives. And the costs involved in getting to the Court can be high. To apply for certiorari costs only \$300 (plus 40 copies of the petition), but if certiorari is granted and the case is heard, the costs—for lawyers and for copies of the lower-court records in the case—can be very high. And by then one has already paid for the cost of the first hearing in the district court and probably one appeal to the circuit court of appeals. Furthermore, the time it takes to settle a matter in federal court can be quite long.

But there are ways to make these costs lower. If you are indigent—without funds—you can file and be heard as a pauper for nothing; about half the petitions arriving before the Supreme Court are ***in forma pauperis*** (such as the one from Gideon, described earlier). If your case began as a criminal trial in the district courts and you are poor, the government will supply you with a lawyer at no charge. If the matter is not a criminal case and you cannot afford to hire a lawyer, interest groups representing a wide spectrum of opinions sometimes are willing to take up the cause, if the issue in the case seems sufficiently important. The American Civil Liberties Union (ACLU), a liberal group, represents some people who believe their freedom of speech has been abridged or their constitutional rights in criminal proceedings have been violated. The Center for Individual Rights, a conservative group, represents some people who feel that they have been victimized by racial quotas.

But interest groups do much more than just help people pay their bills. Many of the most important cases decided by the Court got there because an interest group organized the case, found the plaintiffs, chose the legal strategy, and mobilized legal allies. The NAACP has brought many key civil rights cases on behalf of individuals. Although in the past few decades conservative interest groups have entered the courtroom on behalf of individuals. One helped sue CBS for televising a program that allegedly libeled General William Westmoreland, once the American commander in Vietnam. (Westmoreland lost the case.) Other conservative groups

have supported challenging affirmative action programs in colleges and universities (some of which have survived, some of which have not; see Chapter 6). And attorneys representing state and local governments raise many important issues. Several price-fixing cases have been won by state attorneys general on behalf of consumers in their states.

## Fee Shifting

Unlike what happens in most of Europe, each party to a lawsuit in this country must pay its own way. (In England, by contrast, if you sue someone and lose, you pay the winner's costs as well as your own.) But various laws have made it easier to get someone else to pay. **Fee shifting** enables the **plaintiff** (the party that initiates the suit) to collect its costs from the defendant if the defendant loses, at least in certain kinds of cases. For example, if a corporation is found to have violated the antitrust laws, it must pay the legal fees of the winner. If an environmentalist group sues the Environmental Protection Agency and wins, it can get the EPA to pay the group's legal costs. Even more important to individuals, Section 1983 of Chapter 42 of the *United States Code* allows a citizen to sue a state or local government official—say, a police officer or a school superintendent—who has deprived the citizen of some constitutional right or withheld some benefit to which the citizen is entitled. If the citizen wins, he or she can collect money damages and lawyers' fees from the government. Citizens, more aware of their legal rights, have become more litigious, and a flood of such "Section 1983" suits has burdened the courts. The Supreme Court has restricted fee shifting to cases authorized by statute,<sup>41</sup> but it is clear that the drift of policy has made it cheaper to go to court—at least for some cases.

## Standing

There is, in addition, a nonfinancial restriction on getting into federal court. To sue, one must have **standing**, a legal concept that refers to who is entitled to bring a case. It is especially important in determining who can challenge the laws or actions of the government itself. A complex and changing set of rules governs standings; some of the more important ones are these:

- There must be an actual controversy between real adversaries. (You cannot bring a "friendly" suit against someone, hoping to lose in order to prove your friend right. You cannot ask a federal court for an opinion on a hypothetical or imaginary case or ask it to render an advisory opinion.)
- You must show that you have been harmed by the law or practice about which you are complaining. (It is not enough to dislike what the government or a corporation or a labor union does; you must show that you were actually harmed by that action.)
- Merely being a taxpayer does not ordinarily entitle you to challenge the constitutionality of a federal governmental action. (You may not want your tax money to be spent in certain ways, but your remedy is to vote against the politicians doing the spending; the federal courts generally will require that you show some other personal harm before you can sue.)

Congress and the courts recently have made it easier to acquire standing. It always has been the rule that a citizen could ask the courts to order federal officials to carry out some act that they were under a legal obligation to perform, or to refrain from some action that was contrary to law. A citizen can also sue a government official personally to collect damages if the official acted contrary to law. For example, it was long the case that if an FBI agent broke into your office without a search warrant, you could sue the agent and, if you won, collect money. However, you cannot sue the government itself without its consent. This is the doctrine of **sovereign immunity**. For instance, if the army accidentally kills your cow while testing a new cannon, you cannot sue the government to recover the cost of the cow unless the government agrees to be sued. (Since testing cannons is legal, you cannot sue the army officer who fired the cannon.) By statute, Congress has given its consent for the government to be sued in many cases involving a dispute over a contract or damage done as a result of negligence (e.g., the dead cow). Over the years, these statutes have made it easier to take the government into court as a defendant.

Even some of the oldest rules defining standing have been liberalized. The rule that merely being a taxpayer does not entitle you to challenge in court a government decision has been relaxed where the citizen claims that a First Amendment right is being violated. The Supreme Court allowed a taxpayer to challenge a federal law that would have given financial aid to parochial (or church-related) schools on the grounds that this aid violated the constitutional requirement of separation between church and state. On the other hand, another taxpayer suit to force the CIA to make public its budget failed, because the Court decided that the taxpayer did not have standing in matters of this sort.<sup>42</sup>

## Class-Action Suits

Under certain circumstances, citizens can benefit directly from a court decision, even if they have not gone into court. This can happen by means of a **class-action suit**, a case brought into court by a person or people on behalf not only of themselves but of all other persons in similar circumstances. Among the most famous of class-action suits was the 1954 case in which the Supreme Court found that Linda Brown, a black girl attending the fifth grade in the Topeka, Kansas, public schools, was denied the equal protection of the laws

**fee shifting** A rule that allows a plaintiff to recover costs from the defendant if the plaintiff wins.

**plaintiff** The party that initiates a lawsuit.

**standing** A legal rule stating who is authorized to start a lawsuit.

**sovereign immunity** The rule that a citizen cannot sue the government without the government's consent.

**class-action suit** A case brought by someone to help both him- or herself and all others who are similarly situated.

(guaranteed under the Fourteenth Amendment) because the schools in Topeka were segregated. The Court did not limit its decision to Linda Brown's right to attend an unsegregated school but extended it—as Brown's lawyers from the NAACP had asked—to cover all “others similarly situated.”<sup>43</sup> It was not easy to design a court order that would eliminate segregation in the schools, but the principle was established clearly in this class action.

Since the *Brown* case, many other groups have been quick to take advantage of the opportunity created by class-action suits. By this means, the courts could be used to give relief not simply to a particular person but to all those represented in the suit. A landmark class-action case challenged the malapportionment of state legislative districts (see Chapter 9).<sup>44</sup> There are thousands of class-action suits in the federal courts involving civil rights, the rights of prisoners, antitrust suits against corporations, and other matters. These suits became more common partly because people were beginning to have new concerns that were not being met by Congress, and partly because some class-action suits became quite profitable. The NAACP got no money from Linda Brown or from the Topeka Board of Education in compensation for its long and expensive labors, but, beginning in the 1960s, court rules were changed to make it financially attractive for lawyers to bring certain kinds of class-action suits.

Suppose, for example, that you think your telephone company overcharged you by \$75. You could try to hire a lawyer to get a refund, but not many lawyers would take the case because there would be no money in it. Even if you were to win, the lawyer would stand to earn no more

than perhaps one-third of the settlement, or \$25. Now suppose you bring a class action against the company on behalf of everybody who was overcharged. Millions of dollars might be at stake; lawyers would line up eagerly to take the case because their share of the settlement, if they won, would be huge. The opportunity to win profitable class-action suits, combined with the possibility of having the loser pay the attorneys' fees, led to a proliferation of such cases.

In response to the increase in its workload, in 1974 the Supreme Court decided to drastically tighten the rules governing these suits. It held that except in certain cases defined by Congress, such as civil rights matters, it would no longer hear class-action suits seeking monetary damages unless each and every ascertainable member of the class was individually notified of the case. To do this often is prohibitively expensive (imagine trying to find and send a letter to every customer that may have been overcharged by the telephone company!) and so the number of such cases declined, and the number of lawyers seeking them out dropped.<sup>45</sup>

But it remains easy to bring a class-action suit in most state courts. A state judge in a small Illinois town told State Farm automobile insurance company that it must pay over \$1 billion in damages on behalf of a “national” class, even though no one in this class had been notified. Big class-action suits powerfully affect how courts make public policy. Such suits have forced into bankruptcy companies making asbestos and silicone breast implants, and have threatened to put out of business tobacco companies and gun manufacturers. (Ironically, in some of these cases, such as the one involving breast implants, there was no scientific evidence showing that the product was harmful.) Some class-action suits, such as the suit ending school segregation, are good—but others are frivolous efforts to get companies to pay large fees to the lawyers who file the suits.

In sum, getting into court depends on having standing and having resources. The rules governing standing are complex and changing, but generally they have been broadened to make it easier to enter the federal courts, especially for the purpose of challenging the actions of the government. Obtaining the resources is not easy, but has become easier because laws in some cases now provide for fee shifting, private interest groups are willing to finance cases, and it is sometimes possible to bring a class-action suit that lawyers find lucrative.

## 12-4 The Supreme Court in Action

If your case should find its way to the Supreme Court—and of course the odds are that it will not—you will be able to participate in one of the more impressive, sometimes dramatic ceremonies of American public life. The Court is in session in its white marble building for 36 weeks out of each year, from early October until the end of June. The nine justices read briefs in their individual offices, hear oral arguments in the stately courtroom, and discuss their decisions with one another in a conference room where no outsider is ever allowed.



**IMAGE 12-4** Linda Brown was refused admission to a white elementary school in Topeka, Kansas. On her behalf, the NAACP brought a class-action suit that resulted in the 1954 landmark Supreme Court decision *Brown v. Board of Education*.



Most cases, as we have seen, come to the Court on a writ of certiorari. The lawyers for each side may then submit their briefs. A **brief** is a document that sets forth the facts of the case, summarizes the lower-court decision, gives the arguments for the side represented by the lawyer who wrote the brief, and discusses the other cases that the Court has decided bear on the issue. Then the lawyers are allowed to present their oral arguments in open court. They usually summarize their briefs or emphasize particular points, and they are strictly limited in time—usually to no more than a half hour. (The lawyer speaks from a lectern that has two lights on it. When the white light goes on, the attorney has five minutes remaining; when the red flashes, he or she must stop—instantly.) The oral arguments give the justices a chance to question the lawyers, sometimes searchingly.

Since the federal government is a party as either plaintiff or defendant to about half the cases that the Supreme Court hears, the government's top trial lawyer, the solicitor general of the United States, appears frequently before the Court. The solicitor general is the third-ranking officer of the Department of Justice, right after the attorney general and deputy attorney general. The solicitor general decides what cases the government will appeal from lower courts and personally approves every case the government presents to the Supreme Court. In recent years, the solicitor general often has been selected from the ranks of distinguished law school professors.

In addition to the arguments made by lawyers for the two sides in a case, written briefs and even oral arguments may also be offered by “a friend of the court,” or **amicus curiae**. An amicus brief is from an interested party not involved directly in the suit. For example, when Allan Bakke complained that he had been the victim of “reverse discrimination” when he was denied admission to a University of California medical school, 58 amicus briefs were filed supporting or opposing his position. Before such briefs can be filed, both parties must agree or the Court must grant permission. Though these briefs sometimes offer new arguments, they are really a kind of polite lobbying of the Court that declare which interest groups are on which side. The ACLU, the NAACP, the AFL-CIO, and the U.S. government itself have been among the leading sources of such briefs.

These briefs are not the only source of influence on the justices' views. Legal periodicals such as the *Harvard Law Review* and the *Yale Law Journal* are frequently consulted, and citations to them often appear in the Court's decisions. Thus the outside world of lawyers and law professors can help shape, or at least supply arguments for, the conclusions of the justices.

The justices retire every Friday to their conference room, where in complete secrecy they debate the cases they have heard. The chief justice speaks first, followed by the other justices in order of seniority. After the arguments they vote, traditionally in reverse order of seniority: the newest justice votes first, the chief justice last. By this process an able chief justice can exercise considerable influence—in guiding or limiting debate, in setting forth the issues, and in handling sometimes-temperamental personalities.

In deciding a case, a majority of the justices must be in agreement; if there is a tie, the lower-court decision is left standing. There can be a tie among nine justices due to illness or voluntary recusal because of prior involvement in the case. In 2016, for example, the Supreme Court deadlocked over whether President Barack Obama's 2014 executive action granting temporary legal status to some groups of illegal immigrants. Because of the death of Justice Antonin Scalia in early 2016, only eight justices voted in the case, and they were evenly divided, 4-4, which meant that an appeals court's ruling blocking the plan stayed in place. And a 2016 ruling on affirmative action had only seven votes, due to the vacancy from Scalia's death and the recusal by Justice Elena Kagan because she previously had worked on the case as solicitor general in the Obama administration. (See Chapter 5, p. 93, for a discussion of the affirmative action ruling, and Chapter 10, p. 211, for a discussion of the immigration ruling.)

Though the vote is what counts, by tradition the Court usually issues a written opinion explaining its decision.

**brief** A written statement by an attorney that summarizes a case and the laws and rulings that support it.

**amicus curiae** A brief submitted by a “friend of the court.”

**TABLE 12-2** Supreme Court Justices in Order of Seniority

Name (Birth Date)	Home State	Prior Experience	Appointed by (Year)
John G. Roberts, Jr., Chief Justice (1955)	Maryland	Federal judge	G. W. Bush (2005)
Anthony Kennedy (1936)	California	Federal judge	Reagan (1988)
Clarence Thomas (1948)	Georgia	Federal judge	G. H. W. Bush (1991)
Ruth Bader Ginsburg (1933)	New York	Federal judge	Clinton (1993)
Stephen Breyer (1938)	Massachusetts	Federal judge	Clinton (1994)
Samuel Alito (1950)	New Jersey	Federal judge	G. W. Bush (2006)
Sonia Sotomayor (1954)	New York	Federal judge	Obama (2009)
Elena Kagan (1960)	New York	Law school dean	Obama (2010)

**Note:** Justice Antonin Scalia was appointed to the Court by President Ronald Reagan in 1986, and served until his death in 2016.



**per curiam opinion**

A brief, unsigned court opinion.

**opinion of the Court**

A signed opinion of a majority of the Supreme Court.

**concurring opinion**

A signed opinion in which one or more members agree with the majority view but for different reasons.

**dissenting opinion**

A signed opinion in which one or more justices disagree with the majority view.

**stare decisis** “Let the decision stand,” or allowing prior rulings to control the current case.

Sometimes the opinion is brief and unsigned (called a **per curiam opinion**); sometimes it is quite long and signed by the justices agreeing with it. If the chief justice is in the majority, he will either write the opinion or assign the task to a justice who agrees with him. If he is in the minority, the senior justice on the winning side will decide who writes the Court's opinion. There are three kinds of opinions: an **opinion of the Court** (reflecting the majority's view), a **concurring opinion** (an opinion by one or more justices who agree with the majority's conclusion but for different reasons that they wish to express), and a **dissenting opinion** (the opinion of the justices on the losing side). Each justice has three or four law clerks to help him or her review the many petitions the Court receives, study cases, and write opinions.

Many Supreme Court decisions, perhaps two-fifths of them, are decided unanimously. In these cases, the law is clear and no difficult questions of interpretation exist. But for the remaining cases, there appear to be two main blocs and one swing vote on today's Court:

- A conservative bloc of Samuel Alito, John Roberts, and Clarence Thomas (and Justice Antonin Scalia until his death in 2016).

- A liberal bloc of Stephen Breyer, Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor.
- A swing vote of Anthony Kennedy. He often votes with the conservatives on criminal law but on some other cases (abortion, gay rights, and foreign combatants detained at Guantanamo Bay) votes with the liberals.

## The Power of the Federal Courts

The great majority of the cases heard in the federal courts have little or nothing to do with changes in public policy: people accused of bank robbery are tried, disputes over contracts are settled, personal-injury cases are heard, and patent law is applied. In most instances, the courts are simply applying a relatively settled body of law to a specific controversy.

### The Power to Make Policy

The courts make policy whenever they reinterpret the law or the Constitution in significant ways, extend the reach of existing laws to cover matters not previously thought to be covered by them, or design remedies for problems that involve the judges' acting in administrative or legislative ways. By any of these tests the courts have become exceptionally powerful.

One measure of that power is the fact that more than 160 federal laws have been declared unconstitutional. And as we shall see, on matters where Congress feels strongly, it can often get its way by passing slightly revised versions of a voided law.

Another measure, and perhaps a more revealing one, is the frequency with which the Supreme Court changes its mind. An informal rule of judicial decision making has been **stare decisis**, meaning “let the decision stand.” It is the principle of precedent; a court case today should be settled in accordance with prior decisions on similar cases. What



**IMAGE 12-5** The 2015 members of the U.S. Supreme Court. Front row: Justices Clarence Thomas and Antonin Scalia, Chief Justice John Roberts, Justices Anthony Kennedy and Ruth Bader Ginsburg; second row: Justices Sonia Sotomayor, Stephen Breyer, Samuel Alito, and Elena Kagan. Justice Scalia died in early 2016.

constitutes a similar case is not always clear; lawyers are especially gifted at finding ways of showing that two cases are different in some relevant way.

There are two reasons why precedent is important. The practical reason should be obvious: if the meaning of the law continually changes, if the decisions of judges become wholly unpredictable, then human affairs affected by those laws and decisions become chaotic. A contract signed today might be invalid tomorrow. The other reason is at least as important: if the principle of equal justice means anything, it means that similar cases should be decided in a similar manner. On the other hand, times change, and the Court can make mistakes. As Justice Felix Frankfurter once said, “Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”<sup>46</sup>

However compelling the arguments for flexibility, the pace of change can become dizzying. By one count, the Court has overruled its own previous decisions in more than 260 cases since 1810.<sup>47</sup> In fact, it may have done it more often, because sometimes the Court does not say that it is abandoning a precedent, claiming instead that it is merely distinguishing the present case from a previous one.

A third measure of judicial power is the degree to which courts are willing to handle matters once left to the legislature. For example, the Court refused for a long time to hear a case about the size of congressional districts, no matter how unequal their populations.<sup>48</sup> The determination of congressional district boundaries was regarded as a **political question**—that is, as a matter that the Constitution left entirely to another branch of government (in this case, Congress) to decide for itself. Then in 1962, the Court decided that it was competent after all to handle this matter, and the notion of a “political question” became a much less important (but by no means absent) barrier to judicial power.<sup>49</sup>

By all odds the most powerful indicator of judicial power can be found in the kinds of remedies that the courts will impose. A **remedy** is a judicial order setting forth what must be done to correct a situation that a judge believes to be wrong. In ordinary cases, such as when one person sues another, the remedy is straightforward: the loser must pay the winner for some injury that he or she has caused, the loser must agree to abide by the terms of a contract he or she has broken, or the loser must promise not to do some unpleasant thing (such as dumping garbage on a neighbor’s lawn).

Today, however, judges design remedies that go far beyond what is required to do justice to the individual parties who actually appear in court. The remedies now imposed often apply to large groups and affect the circumstances under which thousands or even millions of people work, study, or live. For example, when a federal district judge in Alabama heard a case brought by a prison inmate in that state, he issued an order not simply to improve the lot of that prisoner but to revamp the administration of the entire prison system. The result was an improvement in the living conditions of many prisoners, at a cost to the state of an estimated \$40 million a year. Similarly, people who feel entitled to welfare payments that have been denied them may sue in court to get the money, and the court order will in all likelihood affect all welfare recipients. In one case, certain court orders made an additional 100,000 people eligible for welfare.<sup>50</sup>

The basis for sweeping court orders sometimes can be found in the Constitution; the Alabama prison decision,

### political question

An issue the Supreme Court will allow the executive and legislative branches to decide.

**remedy** A judicial order enforcing a right or redressing a wrong.



Kevork Djansetian/Getty Images

**IMAGE 12-6** The activism of federal courts is exemplified by the sweeping orders they have issued to correct such problems as overcrowded prisons.

for example, was based on the judge's interpretation of the Eighth Amendment, which prohibits "cruel and unusual punishments."<sup>51</sup> Others are based on court interpretations of federal laws. The Civil Rights Act of 1964 forbids discrimination on grounds of "race, color, or national origin" in any program receiving federal financial assistance. The Supreme Court interpreted that to mean the San Francisco school system was obliged to teach English to Chinese students unable to speak it.<sup>52</sup> Since a Supreme Court decision is the law of the land, the impact of that ruling was not limited to San Francisco. Local courts and legislatures elsewhere decided that that decision meant that classes must be taught in Spanish for Hispanic children. What Congress meant by the Civil Rights Act is not clear; it may or may not have believed that teaching Hispanic children in English rather than Spanish was a form of discrimination. What is important is that it was the Court, not Congress, which decided what Congress meant.

### Views of Judicial Activism

Judicial activism has, of course, been controversial. Those who support it argue that the federal courts must correct injustices when the other branches of the federal government, or the states, refuse to do so. The courts are the institution of last resort for those without the votes or the influence to obtain new laws, and especially for the poor and powerless. After all, Congress and the state legislatures tolerated segregated public schools for decades. If the Supreme Court had not declared segregation unconstitutional in 1954, it might still be law today.

Those who criticize judicial activism rejoin that judges usually have no special expertise in matters of school administration, prison management, environmental protection, and so on; they are lawyers, expert in defining rights and duties but not in designing and managing complex institutions. Furthermore, however desirable court-declared rights and principles may be, implementing those principles means balancing the conflicting needs of various interest groups, raising and spending tax monies, and assessing the costs and benefits of complicated alternatives. Finally, federal judges are not elected; they are appointed and are thus immune to popular control. As a result, if they depart from their traditional role of making careful and cautious interpretations of what a law or the Constitution means and instead begin formulating wholly new policies, they become unelected legislators.

### Checks on Judicial Power

No institution of government, including the courts, operates without restraint. Even though judges are not elected, they are attentive to public opinion and the views of the other branches of government, as *Marbury v. Madison* clearly demonstrated. The importance of these restraints varies from case to case, but in the broad course of history they have been significant.

One restraint exists because of the very nature of courts. A judge has no police force or army. Decisions that he or she makes sometimes can be resisted or ignored, *if* the person or organization resisting is not highly visible and is willing to run the risk of being caught and charged with contempt of court.

For example, long after the Supreme Court's controversial decisions that praying and Bible reading could not take place in public schools,<sup>53</sup> schools all over the country were still allowing prayers and Bible reading.<sup>54</sup> Years after the Court declared segregated schools to be unconstitutional, scores of school systems remained segregated. On the other hand, when a failure to comply is easily detected and punished, the courts' power usually is unchallenged. When the Supreme Court declared the income tax to be unconstitutional in 1895, income tax collections promptly ceased. When the Court in 1952 declared illegal President Harry Truman's effort to seize the steel mills in order to stop a strike, the management of the mills was immediately returned to their owners.

### Congress and the Courts

Congress has a number of ways of checking the judiciary. It can gradually alter the composition of the judiciary by the kinds of appointments the Senate is willing to confirm, or it can impeach judges it does not like. Fifteen federal judges have been the object of impeachment proceedings in our history, and nine others have resigned when such proceedings seemed likely. Of the 15 who were impeached, eight were convicted by the Senate, four were acquitted, and three resigned before trial. In 2009, Samuel Kent resigned from the U.S. District Court for the Southern District of Texas, and in



## HOW WE COMPARE

### Judicial Review in Canada and Europe

Courts outside the United States can declare laws to be unconstitutional, but most can do so in ways that are very different from those in the United States.

**Canada:** The highest court can declare a law unconstitutional, but not if the legislature has passed it with a special provision that says the law will survive judicial scrutiny notwithstanding the country's Charter of Rights. Such laws must be renewed every five years.

**Europe:** The European Court of Human Rights in Strasbourg can decide human rights cases that begin in any of the nations that make up the European Community.

**France:** Its Constitutional Council can declare a law unconstitutional, but only if asked to do so by government officials and only before (not after) the law goes into effect.

**Germany:** The Federal Constitutional Court can declare in an advisory opinion, before a case has emerged, that a law is unconstitutional, and it can judge the constitutionality of laws when asked to do so by a lower court (which itself cannot rule a law unconstitutional). The Federal Constitutional Court may hold an administrative or judicial action to be unjustified when a citizen, having exhausted all other remedies, files a petition.



2010, Thomas Porteous was convicted by the Senate and removed from office.<sup>55</sup> However, in practice confirmation and impeachment proceedings do not make much of an impact on the federal courts, because simple policy disagreements are not regarded generally as adequate grounds for voting against a judicial nominee or for starting an impeachment effort.

Congress can alter the number of judges, though, and by increasing the number sharply, it can give a president a chance to appoint judges to his liking. As described above, a “Court-packing” plan was proposed (unsuccessfully) by Franklin Roosevelt in 1937 specifically to change the political persuasion of the Supreme Court. In 1978, Congress passed a bill creating 152 new federal district and appellate judges to help ease the workload of the federal judiciary. This bill gave President Carter a chance to appoint over 40 percent of the federal bench. In 1984, an additional 84 judgeships were created; by 1988, President Reagan had appointed about half of all federal judges. In 1990, an additional 72 judges were authorized. During and after the Civil War, Congress may have been trying to influence Supreme Court decisions when it changed the size of the Court three times in six years (raising it from nine to 10 in 1863, lowering it again from 10 to seven in 1866, and raising it again from seven to nine in 1869).

Congress and the states can also undo a Supreme Court decision interpreting the Constitution by amending that document. This happens, but rarely: the Eleventh Amendment was ratified to prevent a citizen from suing a state in federal court; the Thirteenth, Fourteenth, and Fifteenth were ratified to undo the *Dred Scott* decision regarding slavery; the Sixteenth was added to make it constitutional for Congress to pass an income tax; and the Twenty-sixth was added to give the vote to 18-year-olds in state elections.

On more than 30 occasions, Congress has merely repassed a law that the Court has declared unconstitutional. In one case, a bill to aid farmers, voided in 1936, was accepted by the Court in slightly revised form three years later.<sup>56</sup> (In the meantime, of course, the Court had changed its collective mind about the New Deal.)

One of the most powerful potential sources of control over the federal courts, however, is the authority of Congress, given by the Constitution, to decide what the entire jurisdiction of the lower courts and the appellate jurisdiction of the Supreme Court shall be. In theory, Congress could prevent matters on which it did not want federal courts to act from ever coming before the courts. This happened in 1868. A Mississippi newspaper editor named McCardle was jailed by federal military authorities who occupied the defeated South. McCardle asked the federal district court for a writ of habeas corpus to get him out of custody; when the district court rejected his plea, he appealed to the Supreme Court. Congress at that time was fearful that the Court might find unconstitutional the laws on which its Reconstruction policy was based—and under which McCardle was in jail. To prevent that from happening, it passed a bill withdrawing from the Supreme Court appellate jurisdiction in cases of this sort. The Court conceded that Congress could do this and thus dismissed the case because it no longer had jurisdiction.<sup>57</sup>

Congress has threatened to withdraw jurisdiction on other occasions, and the mere existence of the threat may have influenced the nature of Court decisions. In the 1950s, for example, congressional opinion was hostile to Court decisions in the field of civil liberties and civil rights, and legislation was proposed that would have curtailed the Court’s jurisdiction in these areas. It did not pass, but the Court may have allowed the threat to temper its decisions.<sup>58</sup> On the other hand, as congressional resistance to the Roosevelt Court-packing plan shows, the Supreme Court enjoys a good deal of prestige in the nation, even among people who disagree with some of its decisions. Passing laws that would frontally attack it would not be easy except perhaps in times of national crisis.

Furthermore, laws narrowing jurisdiction or restricting the kinds of remedies that a court can impose often are blunt instruments that might not achieve the purposes of their proponents. Suppose that you, as a member of Congress, would like to prevent the federal courts from ordering schoolchildren to be bused for the purpose of achieving racial balance in the schools. If you denied the Supreme Court appellate jurisdiction in this matter, you would leave the lower federal courts and all state courts free to do as they wished, and many of them would go on ordering busing. If you wanted to attack that problem, you could propose a law that would deny to all federal courts the right to order busing as a remedy for racial imbalance. But the courts would still be free to order busing (and of course a lot of busing goes on even without court orders), provided that they did not say that it was for the purpose of achieving racial balance. (It could be for the purpose of “facilitating desegregation” or making possible “redistricting.”) Naturally, you could always make it illegal for children to enter a school bus for any reason, but then many children would not be able to get to school at all. Finally, the Supreme Court might well decide that if busing were essential to achieve a constitutional right, then any congressional law prohibiting such busing would itself be unconstitutional. Trying to think through how *that* dilemma would be resolved is like trying to visualize two kangaroos simultaneously jumping into each other’s pouches.

## Public Opinion and the Courts

Though they are not elected, judges read the same news as members of Congress, and thus they, too, are aware of public opinion, especially elite opinion. Though it may be going too far to say the Supreme Court follows the election returns, it is nonetheless true that the Court is sensitive to certain bodies of opinion, especially of those elites—liberal or conservative—to which its members happen to be attuned. The justices will keep in mind historical cases in which their predecessors, by blatantly disregarding public opinion, very nearly destroyed the legitimacy of the Court itself. This was the case with the *Dred Scott* decision, which infuriated the North and was disobeyed widely. No such crisis exists today, but it is altogether possible that changing political moods affect the kinds of remedies that judges will think appropriate.

Opinion not only restrains the courts; it may also energize them. The most activist periods in Supreme Court history have coincided with times when the political system was



undergoing profound and lasting changes. The assertion by the Supreme Court, under John Marshall's leadership, of the principles of national supremacy and judicial review occurred at the time when the Jeffersonian Republicans were coming to power and their opponents, the Federalists, were collapsing as an organized party. The pro-slavery decisions of the Taney Court came when the nation was so divided along sectional and ideological lines as to make almost any Court decision on this matter unpopular. Supreme Court review of economic regulation in the 1890s and 1900s came at a time when the political parties were realigning and the Republicans were acquiring dominance that would last for several decades. The Court decisions of the 1930s corresponded to another period of partisan realignment. (The meaning of a realigning election was discussed in Chapter 8.)

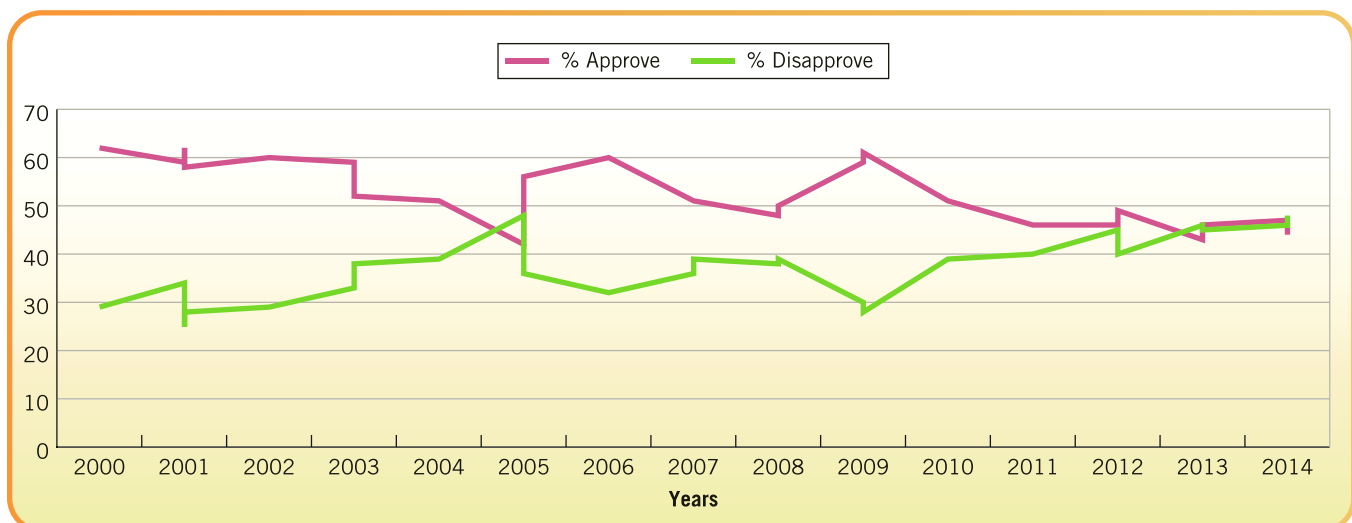
Pollsters have measured changes in public perceptions of how well the Supreme Court is handling its job. The results are shown in Figure 12-6. The percentage of people saying that they approve of how the Court is handling its job has fluctuated in recent years. In the 21st century, public approval of the Court's performance has been as low as 42 percent (in 2005) and as high as 61 percent (in 2009). These movements do not reflect any obvious swings in how the public perceives the Court's ideological tilt. Gallup polls and other opinion surveys indicate that, for most of the last decade, about four-fifths to half of the public thought the Court was neither too liberal nor too conservative, about a third thought the Court was too liberal, and about a fifth thought it was too conservative. Rather, the shifts in opinion seem to reflect the public's reaction not only to what the Court does but also to what the government as a whole is doing. An upturn in public approval of the Supreme Court in the early 1970s was probably caused by the Watergate scandal, an episode that simultaneously discredited the presidency and boosted the stock of those institutions (such as the courts) that seemed to be checking the abuses of the White House. And a gradual

upturn in the 1980s may have reflected a general restoration of public confidence in government during that decade.<sup>59</sup>

Though popular support for the Court sometimes declines, so far these drops have not resulted in any legal checks placed on it. As explained in this chapter's Constitutional Connections feature (see p. 247), each Congress witnesses many proposals that restrict the jurisdiction of federal courts and prohibit them from exercising judicial review in relation to given issues, but these proposals almost never become bills that make their way into law. The changes that have occurred in the Court have been caused by changes in its personnel. Presidents Nixon and Reagan attempted to produce a less activist Court by appointing justices who were more inclined to be strict constructionists and conservatives. To some extent, they succeeded: Justices Kennedy, O'Connor, Rehnquist, and Scalia were certainly less inclined than Justice Thurgood Marshall to find new rights in the Constitution or to overturn the decisions of state legislatures. But as of yet, there has been no wholesale retreat from the positions staked out by the Warren Court. As noted above, a Nixon appointee, Justice Blackmun, wrote the decision making antiabortion laws unconstitutional; and another Nixon appointee, Chief Justice Burger, wrote the opinion upholding court-ordered school busing to achieve racial integration. A Reagan appointee, Justice O'Connor, voted to uphold a right to an abortion. The Supreme Court has become somewhat less willing to impose restraints on police practices, and it has not blocked the use of the death penalty.

But in general, the major features of Court activism and liberalism during the Warren years—school integration, sharper limits on police practice, greater freedom of expression—have remained intact, as has the Court's deference to Congress and the presidency when they have established new agencies or expanded federal programs. The Warren E. Burger Court (1969–1986) was succeeded by Courts with conservative Chief Justices, namely William

**FIGURE 12-6** Public Approval of the Supreme Court's Performance, 2000–2014



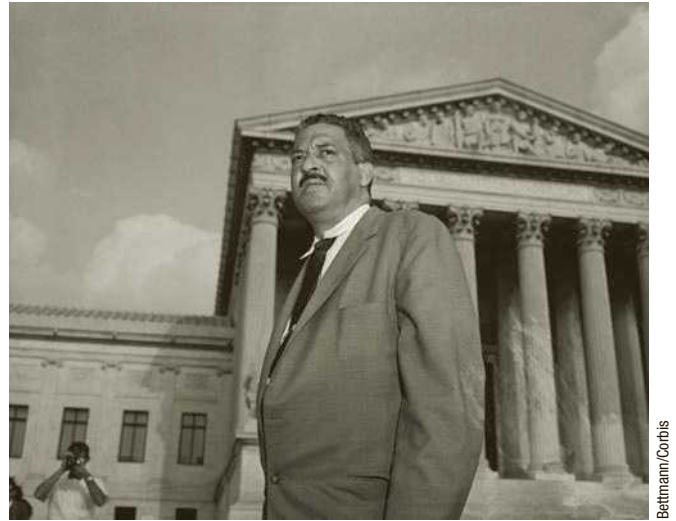
**Source:** Gallup website, "Job Approval: Supreme Court"

H. Rehnquist (1986–2005) and John G. Roberts (2005–present). The aforementioned 2012 Court decision upholding the constitutionality of all of the 2010 health care reform law, save the Medicaid expansion provision, was written by Chief Justice Roberts.

The reasons for the growth in court activism are clear. One is the sheer growth in the size and scope of the government as a whole. The courts have come to play a larger role in our lives because Congress, the bureaucracy, and the president have come to play larger roles. In 1890, hardly anybody would have thought of asking Congress—much less the courts—to make rules governing the participation of women in college sports or the district boundaries of state legislatures. Today such rules are commonplace, and the courts inevitably are drawn into interpreting them. And when the Court decided how the vote in Florida would be counted during the 2000 presidential election, it created an opportunity in the future for scores of new lawsuits challenging election results.

The other reason for increased activism is the acceptance by a large number of judges, conservative as well as liberal, of the activist view of the function of the courts. If courts once existed solely to “settle disputes,” today they also exist in the eyes of their members to “solve problems.”

Though the Supreme Court is the pinnacle of the federal judiciary, most decisions, including many important ones, are made by the several courts of appeals and the 94 district courts. The Supreme Court can control its own workload by deciding when to grant certiorari. It has become easier for citizens and groups to gain access to the federal courts (through class-action suits, by amicus curiae briefs, by laws that require government agencies to pay legal fees). At the



**IMAGE 12-7** Thurgood Marshall became the first black Supreme Court justice. As chief counsel for the NAACP, Marshall argued the 1954 *Brown v. Board of Education* case in front of the Supreme Court. He was appointed to the Court in 1967 and served until 1991.

same time, the courts have widened the reach of their decisions by issuing orders that cover whole classes of citizens or affect the management of major public and private institutions. However, the courts can overstep the bounds of their authority and bring upon themselves a counterattack from both the public and Congress. Congress has the right to control much of the courts' jurisdiction, but it rarely does so. As a result, the ability of judges to make law is only infrequently challenged directly.

## LEARNING OBJECTIVES .....

### 12-1 Explain the concept of judicial review.

Nowhere in the Constitution does it say that the Supreme Court has the power of judicial review. The Constitution is silent on this matter, but the Court has asserted, and almost every scholar has agreed, that our system of separated powers means that the Court must be able to defend the Constitution. Otherwise, Congress and the president would be free to ignore it.

### 12-2 Summarize the development of the federal courts.

The federal courts have focused on different issues in American history depending on major political debates at the time. From the founding through the Civil War, the courts made significant decisions on nation-building, the legitimacy of the federal government, and slavery. From the end of the Civil War to the 1930s, the courts decided key cases on how government may be involved in the economy. Since the 1930s, the courts have concentrated on issues of personal liberty and social equality, and potential conflicts between the two concepts.

### 12-3 Discuss the structure, jurisdiction, and operation of the federal courts.

Article III of the Constitution guarantees federal judges that they can serve during good behavior. The Supreme Court, courts of appeal, and all district courts are all Article III courts. Original jurisdiction refers to a trial held before a court; appellate jurisdiction refers to an appeal a court hears from a trial in another court. Even the Supreme Court has original jurisdiction. For example, it will hear a trial involving ambassadors or a controversy between two or more states.

Strictly speaking, federal judges serve during “good behavior,” but that means they would have to be impeached and convicted in order to be removed. The reason for this protection is clear: The judiciary cannot be independent of the other two branches of government if judges could be removed easily by the president or Congress, and this independence ensures that they are a separate branch of government.

**12-4 Explain how the federal courts exercise power and the checks on judicial power.**

Though the Constitution does not explicitly give federal courts the power of judicial review, they have acquired it on the reasonable assumption that the Constitution would become meaningless if the president and Congress could ignore its provisions. The Constitution, after all, states that it shall be the “supreme law of the land.”

The federal courts rarely think their decisions create entirely new laws, but in fact their interpretations sometimes come close to just that. One reason is that many provisions of the Constitution are vague. What does the Constitution mean by

“respecting an establishment of religion,” the “equal protection of the law,” or a “cruel and unusual punishment”? The courts must give concrete meaning to these phrases. But another reason is the personal ideology of judges. Some think a free press is more important than laws governing campaign finance, while others think a free press must give way to such laws. Some believe the courts ought to use federal law to strike down discrimination, but judges disagree about what types of affirmative action programs must be put in place. Congress can check the courts through nominations and the size of the judiciary, and public opinion also serves as a check on the courts over time. Still, the judicial power is highly significant for policymaking in American politics.

**TO LEARN MORE**

Federal Judicial Center: [www.fjc.gov](http://www.fjc.gov)

Federal courts: [www.uscourts.gov](http://www.uscourts.gov)

Supreme Court decisions: [www.law.cornell.edu](http://www.law.cornell.edu)

Finding laws and reports: [www.findlaw.com](http://www.findlaw.com)

Abraham, Henry J. *The Judicial Process*, 7th ed. New York: Oxford University Press, 1998. An excellent, comprehensive survey of how the federal courts are organized and function.

Abraham, Henry J., and Barbara A. Perry. *Freedom and the Court*, 8th ed. Lawrence: University of Kansas Press, 2003. A careful summary of civil liberties and civil rights cases.

Cardozo, Benjamin N. *The Nature of the Judicial Process*. New Haven, CT: Yale University Press, 1921. An important statement of how judges make decisions, by a former Supreme Court justice.

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Greenburg, Jan Crawford. *Supreme Conflict*. New York: Penguin, 2007. A fascinating journalistic account of how the Supreme Court operates.

Hall, Kermit L., and James W. Ely, Jr., eds. *The Oxford Guide to the United States Supreme Court Decisions*, 2nd ed. New York: Oxford University Press, 2009. Summarizes the 440 most important decisions of the Supreme Court and includes a comprehensive bibliography of books about the Court.

Lasser, William. *The Limits of Judicial Power*. Chapel Hill: University of North Carolina Press, 1988. Shows how the Court through history has withstood the political storms created by its more controversial decisions.

McCloskey, Robert G. *The American Supreme Court*, 4th ed. Edited by Sanford Levinson. Chicago: University of Chicago Press, 2005. A superb brief history of the Supreme Court, updated by one of McCloskey's former students who now teaches law at the University of Texas.

Rabkin, Jeremy. *Judicial Compulsions*. New York: Basic Books, 1989. Explains (and argues against) the extensive Court intervention in the work of administrative agencies.

Wolfe, Christopher. *The Rise of Modern Judicial Review*. New York: Basic Books, 1986; revised ed. New York: Rowman & Littlefield, 1994. An excellent history of judicial review from 1787 to the late twentieth century.





Pete Marovich/Bloomberg/Getty Images

## CHAPTER 13

# Domestic Policy

### LEARNING OBJECTIVES

- 13-1** Explain how America's social welfare policies differ from those of many other modern democracies, and why some programs are politically protected while others are politically imperiled.
- 13-2** Explain the politics that drive environmental programs.



As we explained in Chapter 1, understanding any political system means being able to give reasonable answers to each of two separate but related questions about it: who governs, and to what ends? The preceding chapters should be especially helpful to you in discovering “who governs,” while this chapter and the next should be especially helpful to you in discerning “to what ends.”

The primary puzzles about public policy in America concern the nation’s political agenda (see pp. 7–9). How do people come to believe that certain issues require governmental action? What explains why some issues are on the political agenda while others are not? Why are some issues more prominent on today’s political agenda than in previous historical periods or just a few years ago, and why other issues are less prominent than they once were? Why do elected officials sometimes suddenly shift attention away from some issues and toward others? What explains the timing and character of government action, or inaction, on any given issue?

The causes, contours, and consequences of government action or inaction on any given issue or any class of issues—either domestic or foreign policy—are not explained easily. What may appear at first glance to be simple and stable policymaking patterns often turn out upon closer inspection to be more complex and dynamic than they seemed. For instance, consider what has happened in the realm of social welfare policy.

## Social Welfare Policy

### THEN

Before the 1960s, neither most Washington lawmakers nor most citizens believed that:

- the federal government should ensure that all retirees, whatever their work history, have enough money to live on;
- all veterans of foreign wars receive grants for college and subsidized medical care for life;
- all poor children are guaranteed free or reduced-price meals in schools and during summers;
- all physically, mentally, or developmentally disabled people, like all people with life-threatening medical maladies, are insured for hospital stays and treatment including long-term nursing care;
- all low-wage workers receive tax credits that effectively boost their wages;
- all citizens who may need it have access to affordable housing;
- all low-income children are able to attend preschools;
- all special needs children receive special education;
- all full-time workers who lose their jobs receive unemployment benefits, and in many cases job training.

If they existed at all, national laws touching on these social welfare matters were few and thin; and federal departments, bureaus, or programs to fund or administer such social welfare benefits were virtually nonexistent.

### NOW

Washington sets, funds, and implements policies on all these social welfare matters, and many others. Not only are there many such programs, but they represent a sizable portion of the federal budget. In fiscal year 2014, nearly half of the federal budget went to 2 broad classes of social welfare spending: social security, and health care spending (encompassing Medicare, Medicaid, the State Children’s Health Insurance Program, and the health exchange subsidies provided by the Affordable Care Act).<sup>1</sup>

The Social Security Administration, the U.S. Department of Health and Human Services, and the U.S. Department of Veterans Affairs are among main bureaucracies responsible for federal social welfare policies and programs, but benefits also emanate from several other federal departments. For instance, the U.S. Department of Justice has supported myriad programs for “at-risk youth” including programs that provide mentors to the children of prisoners, and “second chance” job training to young adult ex-prisoners. But in recent years, as policymakers have struggled with big annual budget deficits and a growing public debt, the future of many social welfare policies and programs—including the largest entitlement programs such as Social Security and Medicare—have been placed in some serious doubt for the first time in more than a generation.

To begin to understand policy dynamics, to help explain both short-term shifts and long-term trends in what issues are on the political agenda and how government acts on these issues, we need a theory of policymaking; we offered such a theory in chapter 1. There, we discussed four types of policymaking, which depend on the distribution of the costs and benefits of a program: majoritarian, client, interest group, and entrepreneurial (for a review, see pp. 9–12). This chapter elaborates and applies this theory of policymaking outlined in Chapter 1 to domestic policy dynamics, focusing in particular on social welfare policy and environmental policy. In both types of policies, we will see examples of each of these four types of policymaking.

## 13-1 Social Welfare Policy

In the Preamble to the United States Constitution, one of the reasons given for establishing the national government is a desire to “promote the general Welfare.” Article I, Section 8 of the Constitution states the power of Congress to “provide for the . . . general Welfare.”

From the first, however, the Constitution’s defenders disagreed about what the phrase was supposed to mean. Some, like James Madison, argued that it was meant to restrict Congress to taxing and spending only for things that the Constitution specifically empowered Congress to do (like regulating interstate commerce or maintaining the military). Others, like Alexander Hamilton, argued for a broader meaning that would allow Congress to tax and spend for things that it was not specifically empowered by the Constitution to do, but which might reasonably be expected to meet national needs and benefit some or all citizens.

In the 1930s, asserting a constitutional authority to advance the “general welfare,” Congress enacted a host



## CONSTITUTIONAL CONNECTIONS

### Agenda-Setting and Policymaking

The Framers of the Constitution drafted Article I about Congress because they expected that the legislature would be the primary branch of government. Congress would introduce, consider, and vote on legislation, which the president would sign or veto. Article II of the Constitution discusses the executive branch and says the president “shall from time to time” report to Congress on the state of union, but does not provide more specifics on the president’s role in policymaking.

Until the 1930s, Congress largely directed policymaking, particularly for domestic issues, though some presidents were active in promoting or rejecting legislation. But beginning with the presidency of Franklin D. Roosevelt, the executive office

acquired more political power, resulting in what presidency scholar Fred I. Greenstein has called the “modern presidency.” Four features distinguish the modern presidency from previous chief executives: greater formal and informal power; primary responsibility for agenda-setting; increased staff and advisory resources; and heightened visibility. Increased power creates heightened expectations for leadership, which presidents cannot always meet, but even so, presidents today exercise far more initiative in setting the policy agenda and promoting legislation than the Framers envisioned.

**Source:** Fred I. Greenstein, “Toward a Modern Presidency,” in *Leadership in the Modern Presidency*, ed. Fred I. Greenstein (Cambridge, MA: Harvard University Press, 1988), 1–6.

of new national policies and programs in response to the economic hardships wrought by the Great Depression. The biggest was the Social Security Act of 1935. Among other provisions, the law created a national system of old-age pensions and, to pay for it, imposed an income tax on workers that was deducted from their wages and paid by their employers. In 1937, in the case of *Helvering v. Davis*, the U.S. Supreme Court upheld the constitutionality of that provision, ruling that Congress has broad discretion to tax and spend “in aid of the ‘general welfare,’ ” including policies and programs designed to ease the “plight of men and women” who lose their jobs and provide for others who are either temporarily or permanently “needy and dependent.” Nobody, however, foresaw just how far Congress would go in exercising that power, or where doing so would lead.



## LANDMARK CASES

### Federal Laws About “General Welfare”

- **United States v. Butler (1936):** Found particular federal regulations on agricultural production to be unconstitutional, but proclaimed that Congress has wide power to tax and spend for whatever it deems to be for the “general welfare.”
- **Helvering v. Davis (1937):** Upheld key provisions of the Social Security Act of 1935, and declared that Congress has broad discretion to tax and spend “in aid of the ‘general welfare.’ ”
- **South Dakota v. Dole (1987):** Ruled that Washington could condition the receipt of federal highway funds on a state’s compliance with a 21-year-old drinking age, and declared that Congress’s power to define the “general welfare” and to spend in pursuit of it is virtually unlimited.

### From the New Deal to the New Health Care Law

The first major steps toward today’s social welfare policies and programs were taken after the election of 1932. At the time the Great Depression began in 1929, the job of providing relief—food, money, medicine, and other services—to needy people fell almost entirely to state and local governments or to private charities, and even these sources were concerned primarily with widows, orphans, and older adults.<sup>2</sup> Hardly any state had a systematic program for supporting the unemployed, though many states provided some kind of help if it was clear that the person was out of work through no fault of his or her own. When the economy ground to a near standstill and the unemployment rate rose to include one-fourth of the workforce, private charities and city relief programs nearly went bankrupt. Americans sang the 1931 song “Brother, Can You Spare a Dime?” But with families, neighbors, local churches, charities, and city agencies all unable



**IMAGE 13-1** In 1932, unemployed workers line up at a soup kitchen during the Great Depression.

**insurance program**

A self-financing government program based on contributions that provide benefits to unemployed or retired persons.

**assistance program**

A government program financed by general income taxes that provides benefits to poor citizens without requiring contributions from them.

to meet the economic crisis despite their best efforts, ever more citizens had come to feel that it was time for Uncle Sam to lend a hand by the eve of the 1932 presidential election.

That election produced an overwhelming congressional majority for the Democrats and placed Franklin D. Roosevelt in the White House. Almost immediately, a number of emergency measures were adopted to cope with the depression by supplying federal cash to bail out state and local relief agencies and by creating public works jobs under federal auspices. These measures were

recognized as temporary expedients, however, and were unsatisfactory to those who believed the federal government had a permanent and major responsibility for welfare.

Roosevelt created the Cabinet Committee on Economic Security to consider long-term policies. The committee drew heavily on the experience of European nations and on the ideas of various American scholars and social workers, but it understood that it would have to adapt these proposals to the realities of American politics. Chief among these was the widespread belief that any direct federal welfare program might be unconstitutional. Nowhere did the Constitution give to Congress the explicit authority to set up an unemployment compensation or old-age retirement program. And even if a welfare program were constitutional, many believed, it would be wrong because it violated the individualistic creed that people should help themselves, unless they were physically unable to do so.

But failure by the Roosevelt administration to produce a comprehensive social security program, his supporters felt, might make the president vulnerable in the 1936 election to the leaders of various radical social movements. Huey Long of Louisiana was proposing a “Share Our Wealth” plan; Upton Sinclair was running for governor of California on a platform calling for programs to “End Poverty in California”; and Dr. Francis E. Townsend was leading an organization of hundreds of thousands of older adults, on whose behalf he demanded government pensions of \$200 a month (or slightly more than \$3,400 per month in today’s dollars).

The plan that emerged from the cabinet committee was designed carefully to meet popular demands within the framework of constitutional understandings. It called for two kinds of programs: (1) an **insurance program** for the unemployed and elderly, to which workers would contribute and from which they would benefit when they became unemployed or retired; and (2) an **assistance program** for the blind, dependent children, and the aged. (Giving assistance as well as providing “insurance” for the aged was necessary because for the first few years the insurance program would not pay out any benefits.) The federal government would use its power to tax to provide the funds, but all of the programs

except for old-age insurance would be administered by the states. Everybody, rich or poor, would be eligible for the insurance programs. Only the poor, as defined by a means test (a measure to determine that incomes are below a certain level), would be eligible for the assistance programs. Though opposed bitterly by some, the resulting Social Security Act passed swiftly and virtually unchanged through Congress. It was introduced in January 1935 and signed by President Roosevelt in August of that year.

The Social Security Act became a cornerstone of Roosevelt’s New Deal. But many of the act’s supporters also wanted Washington to guarantee all citizens, including the elderly and the poor, a certain minimum level of health care. The idea of having the government pay the medical and hospital bills of the elderly and the poor had been discussed in Washington since the drafting of the Social Security Act. President Roosevelt and his Committee on Economic Security sensed that medical care would be very controversial, and so health programs were left out of the 1935 bill in order to improve its chances of passage.<sup>3</sup> The proponents of the idea did not abandon it, however. Working mostly within the executive branch, they continued to press—sometimes publicly, sometimes behind the scenes—for a national health care plan. Democratic presidents, including Truman, Kennedy, and Johnson, favored it; Republican president Eisenhower opposed it; Congress was deeply divided on it. The American Medical Association attacked it as “socialized medicine.” For 30 years, key policy entrepreneurs, such as Wilbur Cohen, worked to find a formula that would produce a congressional majority.

The first and highest hurdle to overcome, however, was not Congress as a whole but the House Ways and Means Committee—especially Wilbur Mills of Arkansas, its powerful chairman from 1958 to 1975. A majority of the committee members opposed a national health care program. Some members believed it wrong in principle; others feared that adding a costly health component to the Social Security system would jeopardize the financial solvency and administrative integrity of one of the most popular government programs. By the early 1960s, a majority of the House favored a health care plan, but without the approval of Ways and Means it would never reach the floor.

The 1964 elections changed all that. The Johnson landslide produced such large Democratic majorities in Congress that the composition of the committees changed. In particular, the membership of the Ways and Means Committee was altered. Whereas before it had three Democrats for every two Republicans, after 1964 it had two Democrats for every one Republican. The House leadership saw to it that the new Democrats on the committee were strongly committed to a health care program. Suddenly, the committee had a majority favorable to such a plan, and Mills, realizing that a bill would pass and wanting to help shape its form, changed his position and became a supporter of what was to become Medicare.

Medicare became a cornerstone of Johnson’s Great Society. The policy entrepreneurs in and out of the government who drafted the Medicare plan attempted to anticipate the major objections to it. First, the bill would apply only to the aged—those eligible for Social Security retirement benefits.



This would reassure legislators worried about the cost of providing tax-supported health care for everybody. Second, the plan would cover only hospital expenses, not doctors' bills. Since doctors were not to be paid by the government, they would not be regulated by it; thus, presumably, the opposition of the American Medical Association would be blunted.

Unexpectedly, however, the Ways and Means Committee broadened the coverage of the plan beyond what the administration had thought was politically feasible. It added sections providing medical assistance, called Medicaid, for the poor (defined as those already getting public assistance payments) and payment of doctors' bills for the aged (a new part of Medicare). The new, much-enlarged bill passed both houses of Congress with ease. The key votes pitted a majority of the Democrats against a majority of the Republicans.

Johnson's Great Society programs and "war on poverty" went far beyond Roosevelt's New Deal programs. But neither the chief political architects of Social Security in 1935, nor the main political movers behind Medicare and Medicaid in 1965, ever envisioned millions of Americans receiving food, money, medicine, and other benefits through programs funded largely by the federal government. And no one contemplated that middle-class and even upper-income citizens would one day become as likely to receive federally financed health care as the poorest of the poor. But that day has long since arrived. By 2015, fifty years after the program's creation, more than 55 million Americans were enrolled in Medicare, and more than 71 million Americans were enrolled in Medicaid (or the Children's Health Insurance Program; this number has increased sharply in recent years as a result of the expansion of Medicaid under the Affordable Care Act).<sup>4</sup> Similarly, more than 59 million Americans receive benefits from Social Security.<sup>5</sup>

The two largest federal social welfare programs, Social Security and Medicare, are bound for big increases in beneficiaries over the next several decades as the primary beneficiary population each program serves, persons age 65 and older, grows and grows. And Medicaid, for several decades now the largest program co-funded by the federal government and the states, is being expanded further in most states in accordance with the latest federal health care law (see the discussion in Chapter 3).

As discussed in several previous chapters, one of the most heated political controversies of recent years concerned social welfare policy—namely, the passage of the Patient Protection and Affordable Care Act of 2010. Dubbed "Obamacare" by certain of its critics (and eventually by President Obama himself), the bill was passed by the House and Senate without a single Republican vote. Only 34 Democrats in the House and three in the Senate voted against it.<sup>6</sup> When it passed, public opinion polls indicated the plan was not popular. Its defenders argued that as the law took effect it would win over most people and that in time its cost would go down. Its critics claimed that it would stifle health care by heavy regulations and rapidly rising costs. In the November 2010 congressional elections, the law was not popular and seems to have contributed to large Republican gains in the House and Senate.<sup>7</sup> A case challenging the law's constitutionality made it to the Supreme Court.

In 2012, the Supreme Court upheld the law's constitutionality, excepting its provisions requiring states to expand Medicaid coverage.<sup>8</sup> In 2013, a reelected President Obama began his second term, public opinion on the law became more favorable, and the debate among federal policymakers shifted somewhat from disputes about the law's overall desirability to immediate concerns about its administrative workability and doubts about its long-term potential to contain costs.<sup>9</sup> The law survived another legal challenge in 2015, when the Supreme Court ruled that the federal government may provide subsidies to people who purchase health insurance through the federal exchange if their state does not have its own system for comparing and purchasing health-care plans.<sup>10</sup> (Opponents had argued that the law permitted subsidies only for plans purchased through state-run exchanges.)

Despite all of this activity, Obamacare will continue to be a hot-button issue in the coming years, with the parties divided deeply on both the issue and health care reform in general.

**means test** An income qualification program that determines whether one is eligible for benefits under government programs reserved for lower-income groups.



Joe Raedle/Getty Images; News/Getty Images

**IMAGE 13-2** *The Affordable Care Act guarantees that all Americans will have access to health care.*

## Two Kinds of Social Welfare Programs

Today, some eight decades after Social Security was first debated, two kinds of social welfare programs exist in this country: those that benefit most or all of the people and those that help only a small number of them. In the first category are Social Security and Medicare, programs that provide retirement benefits or medical assistance to almost every citizen who has reached a certain age. In the second are programs such as Temporary Assistance to Needy Children (TANF) and the Supplemental Nutrition Assistance Program (SNAP, which encompasses Food Stamps) that offer help only to people with low incomes.

Legally, the difference between the two kinds of social welfare programs is that the first have no **means test** (they are available to everyone without regard to income) while



**majoritarian**

**politics** A policy in which almost everybody benefits and almost everybody pays.

**client politics**

A policy in which one small group benefits and almost everybody pays.

the second are *means tested* (you must fall below a certain income level to enjoy them). Politically, the programs differ in how they get money from the government. The first kind of welfare program represents **majoritarian politics**: nearly everyone benefits, nearly everyone pays. The second kind represents **client politics**: a relatively low number of people benefit, but almost everyone pays. The biggest problem facing majoritarian welfare programs is their cost: who will pay, and how much will they pay? The biggest problem facing client-oriented programs is their legitimacy: who should benefit, and how should they be served?

This political difference between these programs has a huge impact on how the government acts in regard to them. Social Security and Medicare are sacrosanct. The thought of making any changes that might lower the benefits these programs pay is so risky politically that most politicians never even discuss them. As we discuss in the next section, because of rising senior citizen populations, rising expenses, and rising demands for more benefits, Medicare is in deep financial trouble today, and Social Security will face high financial hurdles in a few decades. Federal policymakers are scrambling for ways of maintaining benefits while hiding the rising costs or postponing dealing with them. No politician wants to raise taxes or cut benefits, so they adopt a variety of halfhearted measures (like slowly increasing the age at which people can get these benefits) designed to postpone the tough decisions until they are out of office.

Client-based welfare programs—those that are means tested—are a very different matter. Like many other client-based programs, their political appeal changes with popular opinion. Take the old Aid to Families with Dependent Children (AFDC) program. When it was started in 1935, people thought of it as a way of helping poor women whose husbands had been killed in war or had died in mining accidents. The goal was to help these women support their children, who had been made fatherless by death or disaster. Most people thought of these women as the innocent victims of a tragedy. No one thought that they would take AFDC for very long. It was a program to help smooth things over for them until they could remarry. About 30 years later, however, the public's opinion of AFDC had begun to change. People started to think AFDC was paying money to women who had never married and had no intention of marrying. The government, according to this view, was subsidizing single-parent families, encouraging out-of-wedlock births, and creating social dependency. From the mid-1960s through the mid-1990s, these views became stronger. AFDC had lost the legitimacy it needed, as a client program, to survive politically. As we discuss in more detail later in this chapter, in 1996 AFDC—even though it never accounted for as much as 1 percent of total federal spending—suffered a fate that few decades-old federal programs of any type ever do, and that

far more costly majoritarian social welfare programs never do; it was abolished in its existing form, and replaced by another program (TANF) that made significant changes to benefits.

Now, however, let's take a closer look at Washington's two biggest social welfare programs, Social Security and Medicare, and how the majoritarian politics surrounding each helps to explain what federal policymakers are (or, more to the point, are not) doing as each program faces severe financial stresses.

## Social Security and Medicare: Majoritarian Politics

When Social Security began in 1935 and Medicare in 1965, many people benefited and the cost was small. In the late 1930s, an old-age check for a retired person on Social Security was paid for by taxes levied on 42 workers; today, only about 3 workers pay for each retired program beneficiary. The current Social Security tax is 12.4 percent of a person's earnings (half of this is paid by the employer). This money is used to make payments to current retirees, with the leftover funds invested in government bonds owned by the Treasury Department.

But that system is breaking down as millions more Americans retire and depend on Social Security for some or all of their income. By 2030, nearly one in five Americans will be age 65 or older; each day, about 10,000 baby boomers (Americans born between 1946 and 1964) turn 65. In 2015, Social Security paid benefits of about \$870 billion to around 59 million people. In its 2015 report, the Social Security Board of Trustees projected that by 2034, if Congress does not act before then, Social Security will be able to pay only 79 percent of scheduled benefits. Some claim, however, that even this forecast is too optimistic, and the program may have to reduce benefits before then.<sup>11</sup>

Still, for at least three reasons, Social Security's prospects for remaining solvent are pretty good. First, it is well run, costing less than 1 percent of total annual expenditures to administer. Second, the program remains highly popular with the public, and most people are aware that it faces a solvency problem. Third, and most importantly, Congress—as it has done in the past when the program's finances were faltering—will almost certainly act well before 2034 to increase future funding so that all scheduled benefits get paid.

Like Social Security, Medicare is a widely popular program. Medicare, however, poses a more formidable financial challenge than Social Security does. In 1965, supporters of Medicare said it would not cost more than \$8 billion a year. Today, Medicare costs more than \$550 billion a year. Even when adjusted for inflation (a dollar in 1965 bought what about \$7.38 did in 2013), that is about 75 times what the program cost when it started. Medicare now has more than 55 million beneficiaries including both senior citizens and younger citizens with disabilities. The number of Medicare beneficiaries is expected to grow by about 50 percent over the next 20 years, reaching about 80 million in the early 2030s.

As presently structured, Medicare allows beneficiaries to visit the doctor or go to the hospital pretty much whenever they feel they need to do so. The doctor or hospital is paid a



## HOW WE COMPARE

### Social Security

Most European democracies began social security systems earlier than the United States did. Even for its time, the U.S. Social Security program that began in 1935 was a relatively modest insurance-based retirement program.

Today, nearly eight decades later, the U.S. Social Security program has grown dramatically and covers more than “old age, disability, and survivors.” Still, European nations not only started sooner but have developed far more comprehensive—and expensive—social security systems than America has yet known.

In many European countries, social security programs extend well beyond retirement benefits or pensions to funding for work-related injury, sickness, maternity leave, and more; the retirement age for eligibility is lower than it is in the United States; and the benefits are, on average, greater.

For example, while the average American has received maybe half of his or her working-life income in benefits, a typical French or German worker has retired several years earlier and received as much as 70 percent of his or her working-life income in benefits. Social security benefits here are earnings-related, but many European nations (Ireland, Switzerland, and the United Kingdom, to name just three) provide a flat-rate pension independent of earnings.

Nothing is free: Europeans have paid two to three times as much as Americans in program-related taxes. And, unlike some European and other nations, the United States has avoided “dual Social Security taxation” via bilateral agreements and policies that do not require either foreign workers in America or Americans who work abroad to pay social security to both countries.

**Sources:** U.S. Social Security Administration, *Social Security Programs Throughout the World*, September 2008, and “U.S. International Social Security Agreements,” 2009, accessed May 27, 2010, at [www.ssa.gov/international/agreements\\_overview.html](http://www.ssa.gov/international/agreements_overview.html).

fee for each visit. This creates three problems: (1) some people use medical services when they don’t really need them; (2) some doctors and hospitals overcharge the government for their services; and (3) doctors and hospitals are paid on the basis of a government-approved payment plan that can change whenever the government wants to save money.

The health care reform law that was enacted in 2010 has scores of different provisions that affect Medicare. A number of these provisions are intended to make Medicare work better and cost less by instituting more sophisticated systems to track differences in pricing for given medical services. By 2013, it had been discovered that for-profit hospitals billed Medicare at a 29 percent higher rate, on average, than non-profit or government-owned hospitals.<sup>12</sup> Both within and

across cities, seemingly similar hospitals charged Medicare widely different prices for the same services (pneumonia, joint replacements, treating complicated cases of asthma or bronchitis, and many others).<sup>13</sup>

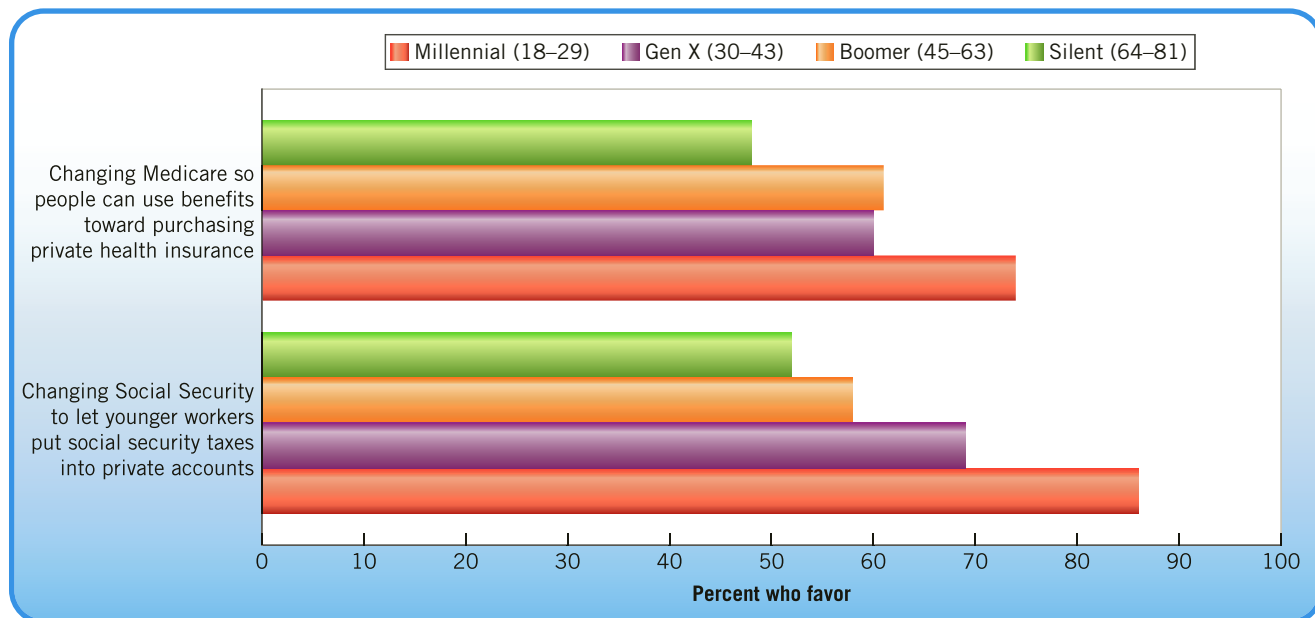
It remains to be seen whether efforts to make Medicare beneficiaries more cost-conscious and Medicare providers less prone to overbill will do much to contain costs or improve services. In its 2015 report, the Medicare Board of Trustees forecast that, even given favorable economic assumptions, including projected savings to be wrought by just such measures, the program’s trust fund will run out of money in 2030. Medicare’s long-term liability is estimated to be more than \$40 trillion. The program’s administrative overhead costs are relatively low (about 5 percent of annual expenditures); but a 2011 report by the Government Accountability Office estimated that each year Medicare makes at least \$48 billion in “improper payments” to doctors, hospitals, medical equipment companies, and other organizations and individuals that it pays or reimburses.

Federal policymakers at both ends of Pennsylvania Avenue and in both parties have struggled to solve each major social welfare program’s problems. For instance, in 2001, the bipartisan Commission to Strengthen Social Security suggested—and President George W. Bush proposed—modifying Social Security by allowing people to invest a portion of their tax contributions into private mutual funds that may be able to generate higher returns than what the government can pay. Congress, however, did not agree, and since 2001, similar proposals have gone nowhere in Washington.

In 2003, a new Medicare bill was passed, designed in part to change the system by allowing people to save, tax-free, money for medical expenses. But the gains this produced would be partially offset by a huge new benefit to retired persons that was the law’s real centerpiece: payments for prescription drugs or, as it became officially known, Medicare Part D. In 2011, Senator Ron Wyden (D-OR) and Representative Paul Ryan (R-WI) introduced a Medicare reform plan. Among other provisions, the Wyden-Ryan plan reduced benefits for the wealthiest senior citizens. It featured a “premium support” (voucher-type) option under which beneficiaries could choose either a traditional Medicare plan or a Medicare-approved private plan. Total out-of-pocket Medicare costs were to be capped at \$6,000 per person, and low-income citizens who could not pay the cap would receive a subsidy from the government. The bipartisan proposal generated much election-year debate but resulted in no far-reaching Medicare reform legislation.

As we learned in Chapter 6 (see pp. 101–102), there are several significant inter-generational gaps in public opinion. “Millennial generation” Americans (ages 18–29) differ from senior citizens on issues ranging from same-sex marriage to immigration. There is a similar age gap in opinion on what to do about Social Security and Medicare. Unlike older Americans, most voters under age 30 favor putting Social Security taxes into private accounts and using Medicare benefits to purchase private health insurance (see Figure 13-1).

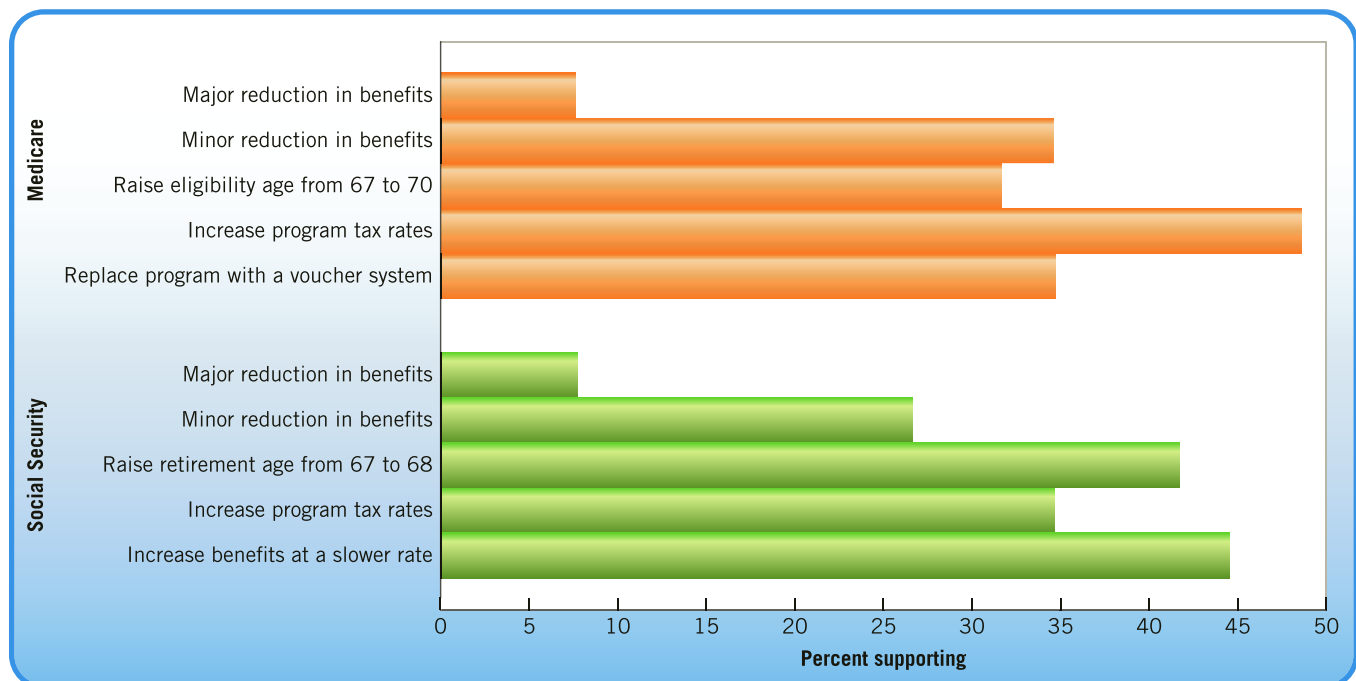
But as we learned in Chapter 8, older Americans vote at much higher rates than young Americans do, especially in midterm congressional elections. Besides, in 2011—even

**FIGURE 13-1** Opinion on Medicare and Social Security Proposals, by Generation

**Source:** Adapted from Andrew Kohut, “Debt and Deficit: A Public Opinion Dilemma,” Pew Research Center for the People & the Press, June 14, 2012.

after years of dire public warnings by present and former lawmakers and blue-ribbon bodies of experts—only 8 percent of the public was willing to entertain “major reductions in benefits” for either program, only a quarter (for Social Security) and a third (for Medicare) was willing to consider “minor reductions in benefits,” and a majority in each case opposed increasing taxes to pay for benefits (see Figure 13-2).

It may be tempting to see the politics of Social Security and Medicare as a species of client politics in which older citizens benefit and young and middle-aged citizens pay. But resist that temptation. It is true that older citizens vote at higher rates than young ones do. It is also true that interest groups that advocate or lobby for older adults and retirees, like the AARP, have great influence in Washington. But most

**FIGURE 13-2** Public Opinion on Changing Medicare and Social Security

**Source:** ABC News/Washington Post Poll, March 10–13, 2011; Kaiser Family Foundation/Harvard School of Public Health Poll, January 4–14, 2011; and School of Public Policy, University of Maryland and Center on Policy Attitudes, “How Americans Would Deal with the Budget Deficit,” February 3, 2011, 49.

citizens, young and old alike, support the programs; and most oppose trimming benefits and tinkering too much with how the programs work presently. Each program is perceived widely as one into which all people pay, and from which all people can and should benefit. The fact that many people receive more in benefits than they ever pay in, like the fact that the programs' massive unfunded liabilities do not fall equally on people of all ages (and will also be borne by citizens yet to be born), would seem to have little bearing on popular attitudes toward these highly popular programs.

Apparently, most federal policymakers also feel that way about the programs. Regardless, even those who may feel differently know that they would court real reelection troubles if they publicly prescribed deep cuts in benefits or steep tax increases for either program. For instance, the first lines of the aforementioned Wyden-Ryan Medicare reform plan read like a majoritarian politics rhapsody; the goal was to "strengthen Medicare and health security for all," with "no changes for those in or near retirement," and guaranteeing that Americans age 56 and older "would see no changes to the structure of their benefits" save any changes they might opt to make voluntarily.

### From AFDC to TANF: Client Politics

All four distinctive features of social welfare policy in the United States are evident in the story of what came to be called Aid to Families with Dependent Children (AFDC). The program began as part of the Social Security Act of 1935. It was scarcely noticed at the time. In response to the Great Depression, the federal government promised to provide aid to states that in many cases were already running programs to help poor children who lacked a father.

Because AFDC involved giving federal aid to existing state programs, it allowed the states to define what

constituted "need," to set benefit levels, and to administer the program. However, Washington did set, and over the years continued to increase, a number of rules governing how the program would work. Washington told the states how to calculate applicants' incomes and, after 1965, required the states to give Medicaid to AFDC recipients (a fact that we return to in the next section when we parse Medicaid's policy dynamics). The states had to establish mandatory job-training programs for many AFDC recipients and to provide child care programs for working AFDC parents. Washington also required that women on AFDC identify their children's fathers. In addition to the growing list of requirements, Washington created new programs for which AFDC recipients were eligible, such as food stamps, the Earned Income Tax Credit (EITC—a cash grant to poor parents who were working), free school meals, various forms of housing assistance, and certain other benefits. But while all this was happening, public opinion moved against the AFDC program.

By the time that abolishing AFDC was being debated in Congress, opinion surveys found more than 70 percent of the public agreed that people "abuse the system by staying on too long"; more than 60 percent agreed that the system "gives people benefits without requiring them to do work" and also permits people "to cheat and commit fraud to get welfare benefits"; and about 60 percent agreed that the program encourages out-of-wedlock births.<sup>14</sup> The combination of souring public opinion, increasing federal regulations, and a growing roster of benefits produced a program that lost many one-time supporters. The states disliked having to conform to a growing list of federal regulations. The public disliked the program, because over time it came to be viewed as weakening the family by encouraging out-of-wedlock births (since AFDC recipients received additional benefits for each new child). The public worried that AFDC recipients



Kevork Djanssean/Getty Images

**IMAGE 13-3** People rally against funding cuts for the Supplemental Nutrition Assistance Program.



were working covertly on the side; the data proved that this was true of at least half of them in several large cities. AFDC recipients saw that the actual (inflation-adjusted) value of their AFDC checks was going down. Critics countered that if you added together all the benefits they were receiving (Food Stamps, Medicaid, housing assistance, etc.), benefit levels were actually going up. Politicians complained that healthy parents were living off AFDC instead of working. The AFDC law was revised many times, including in 1988 (just eight years before AFDC was abolished). But the program was never revised in a way that satisfied all, or even most, of its critics. Though AFDC recipients were only a small fraction of all Americans, they had become a large political problem.

What made the political problem worse was that the composition of the people in the program had changed. In 1970, about half of the mothers on AFDC were there because their husbands had died or divorced them; only a quarter had never been married. By 1994, the situation had changed dramatically; only about a quarter of AFDC mothers were widowed or divorced, and over half had never been married at all. And though most women on AFDC for the first time got off it after just a few years, almost two-thirds of the women on AFDC at any given moment had been on it for eight years or more.

These facts, combined with the increased proportion of out-of-wedlock births in the country as a whole, made it virtually impossible to sustain political support for what had begun as a noncontroversial client program. In 1996 AFDC was abolished. It was replaced by Temporary Assistance for Needy Families (TANF), a block grant program that set strict federal requirements about work and limited how long families can receive federally funded benefits. In 2002, during the largely consensual congressional debate over reauthorizing TANF, even many who had opposed these strategies when TANF replaced AFDC in 1996 now supported them. By 2006, a decade after abolishing AFDC, welfare caseloads nationally had declined by 62 percent. “Ending welfare as we know it,” as in ending AFDC, was widely, albeit no means universally, viewed as a success.

During President Obama’s first term, critics charged that the administration was weakening TANF’s work requirements and permitting TANF recipients to receive benefits longer than the program’s rules allowed. The facts, however, told a different tale: TANF recipients, like most Americans, were simply having greater trouble finding or keeping work amidst the nation’s deep economic downturn.

Similarly, the number of people receiving food stamps increased from about 28 million in 2008 to about 47 million in 2012. Most new food stamp recipients entered the program after losing jobs or having other financial problems that reduced their incomes; but during the 2012 presidential campaign, a debate began over the estimated 2 million or so “able-bodied” food stamp recipients that did not meet all the usual program eligibility criteria, and over allegations concerning widespread “waste, fraud, and abuse” in the program. Again, the facts told a different tale: about 40 percent of all food stamps beneficiaries were children, about 8 percent were senior citizens, and nearly half of all persons receiving benefits lived in a household where someone worked for low wages.

In sum, although they may be quite controversial when they are first proposed and debated, social welfare programs such as Social Security and Medicare—perceived to benefit wide classes of citizens at a cost that is shared by most people (majoritarian politics)—become politically sacrosanct, even though they may have huge costs, pose present and future financial burdens, make billions of dollars in improper payments, and pay out to most beneficiaries more than those beneficiaries ever pay in. In stark contrast, although they may stir little controversy or go virtually unnoticed when they are first proposed and debated, social welfare programs such as the late AFDC—perceived to benefit only certain groups of citizens at a cost that is shouldered by most people (client politics)—will be established and remain politically protected only if the cost to the public at large is not perceived to be great, *and* if the people receiving the benefit are widely deemed “deserving.”

### Medicaid: Client and Majoritarian

At first glance, Medicaid may seem closer to the old AFDC program and the present TANF program than it does to Social Security and Medicare. As explained earlier in this chapter, in 1965 Medicaid was enacted into law in the 11th hour of Medicare’s approval, so that at least some low-income persons who were not Medicare-eligible senior citizens might receive some health care coverage. Today, Medicaid is still a means-tested program that pays the medical expenses of persons receiving TANF payments, mainly TANF-eligible low-income adults and their dependent children.

But now look closer. Medicaid also pays medical expenses of persons receiving Social Security benefits, including senior citizens that have spent their life savings and require long-term medical care, people with permanent or total disabilities, and others, including certain Medicare enrollees. It is true that about two-thirds of all Medicaid beneficiaries are low-income children plus nondisabled low-income adults; the other third are nonelderly disabled adults plus low-income or disabled senior citizens. But it is also true that about two-thirds of Medicaid dollars are spent on the one-third of the Medicaid beneficiaries that are elderly or disabled. The other third or so of Medicaid dollars are spent on the roughly two-thirds of the Medicaid beneficiaries that are TANF-eligible nondisabled low-income adults or low-income children. The average annual per capita Medicaid expenditure for disabled and elderly beneficiaries has been more than four times the average annual per capita Medicaid expenditure for nondisabled adult or low-income child beneficiaries.

In the mid-1990s, when AFDC was being dismantled, more than five times as much public money was being spent on Medicaid as was on AFDC, and a majority of Medicaid beneficiaries were also AFDC beneficiaries. But Medicaid has had, and continues to have, a beneficiary population that AFDC did not—namely, senior citizens and disabled persons. Just as it was some two decades ago when Congress was about the business of ending AFDC, today Medicaid is the main source of public funding for long-term care, accounting for more than half of all government spending on nursing homes, intermediate-care facilities, and medical home-care services. In Congress as well as in state legislatures, Medicaid

has had political support from interest groups beyond those advocating directly for its various beneficiaries—namely, the for-profit firms and nonprofit organizations that receive billions of dollars each year to supply nursing-home care and other services.

Thus it is that the policy dynamics surrounding Medicaid mix client politics with majoritarian politics. Over the last two decades, most proposals to “cut Medicaid” have actually been proposals to trim program benefits for the program’s TANF-eligible adult, nondisabled populations. Almost nobody thinks of poor senior citizens, poor children, or disabled persons as “undeserving.” Since the late 1990s, while Medicaid benefits for TANF-eligible adults have remained flat or been reduced in some states, Medicaid benefits for the program’s youngest and oldest beneficiaries, as well for its disabled beneficiaries, have remained stable or grown just about everywhere, through related policies and programs such as the State Children’s Health Insurance Program (known as S-CHIP).

In sum, because of its client politics components, Medicaid is not as politically sacrosanct as either Social Security or Medicare. But because of its majoritarian politics components, Medicaid—unlike AFDC—has survived every major push for program-wide cuts, while preserving most benefits for TANF-eligible nondisabled adults and expanding benefits for low-income children; and there is not now, nor has there ever been, any politically significant constituency for “ending Medicaid as we know it.” Still, it is too soon to know how Medicaid’s politics might change as the now roughly \$475 billion a year federal-state program continues to expand, or whether the state-to-state differences in benefit levels for some or all of its beneficiary populations will shrink or widen as the new federal health care policy is implemented.

## 13-2 Environmental Policy

Since 1963, more than three dozen major federal environmental laws have been enacted. When an offshore well spewed thousands of gallons of oil onto the beaches of Santa Barbara, California in January, 1969, at the very time when protest politics was in the air, the government and business firms could no longer resist the demand to curtail threats to our natural surroundings. The emerging environmental movement created an occasion—Earth Day, first celebrated on April 22, 1970—to celebrate its beginning.

The movement was hugely successful. In 1970, President Nixon created the Environmental Protection Agency (EPA) and Congress toughened the existing Clean Air Act and passed the Water Quality Improvement Act. Two years later, Congress passed laws designed to clean up the water; three years later, it adopted the Endangered Species Act. New laws were passed right into the 1990s. Existing environmental organizations grew in size, and new ones were formed. Public opinion rallied around environmental issues.

### The Politics of Global Warming

Of course, as on virtually all other issues, public sentiments on environmental policy are not perfectly stable. For instance, today when the public is asked whether economic growth or

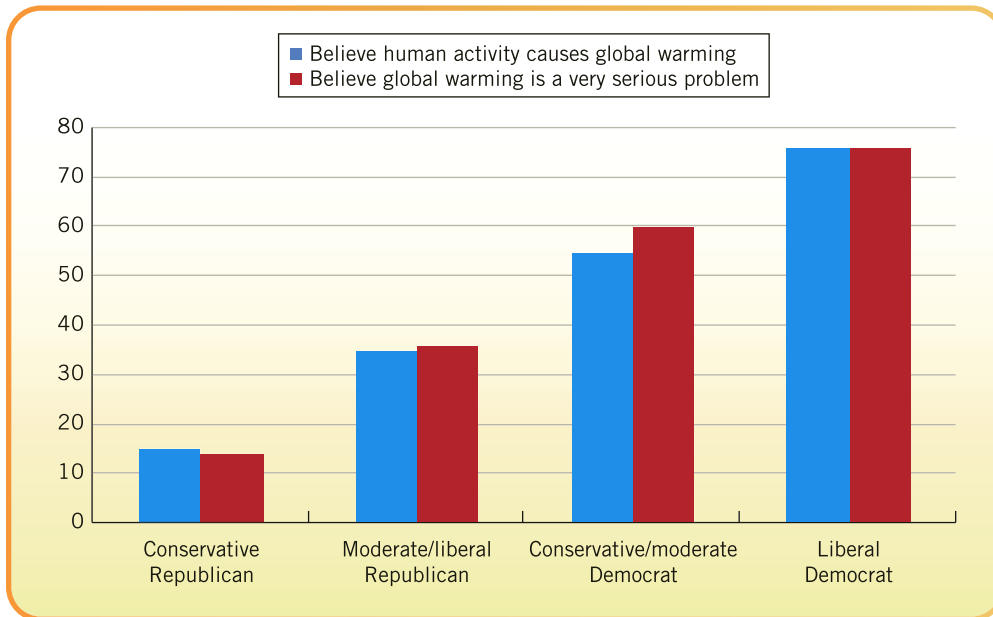
environmental protection should be more important, they are less prone to prefer environmental protection than in recent decades.<sup>15</sup> Still, overall, most Americans are now environmentalists first, including on the single most interesting and important environmental policy issue of our time: global warming.

Global warming occurs when gases, such as carbon dioxide, produced by people when they burn fossil fuels—wood, oil, or coal—get trapped in the atmosphere and cause the earth’s temperature to rise. When the temperature goes up, bad things happen—floods on coastal areas as the polar ice caps melt, wilder weather as more storms are created, and tropical diseases spread throughout the world. The issue might be safely majoritarian by now were it not for partisan differences in how people understand it, as well as how the issue is discussed in the media.

There is a deep partisan and ideological divide on global warming in the American public. Fascinatingly, however, there is no such divide on the basic scientific facts of the issue (for example, that greenhouse gases increase global temperatures).<sup>16</sup> But when we ask people about whether human activity causes global warming, or whether global warming is a serious problem, we see extremely strong partisan and ideological polarization, as Figure 13-3 highlights. What explains this polarization in beliefs, but not underlying facts? The behavior of partisan elites; as we saw in Chapter 6, when party leaders divide on an issue, so do their rank and file members. Many Republican politicians have questioned global warming, while few prominent Democrats have, and the issue has become politicized. As a result of these elite divisions, we see similar divides in the public.<sup>17</sup>

Despite the partisan divide, bipartisan efforts to address the issue have been made in several recent sessions of Congress. For example, in 2009 the House of Representatives passed the American Clean Energy and Security Act, though the bill failed in the Senate. The bill represented perhaps the most ambitious legislative attempt to curb greenhouse gas emissions. It featured a “cap-and-trade” provision that would set maximum emissions of carbon dioxide for most large firms. The emissions allowed by these caps would decline as the years passed. If a firm produced less than the maximum emissions, it could sell part of its permit to another firm. The theory was that firms would take the least costly way to meet the standards: either lowering their emissions or, if that was too expensive, buying an additional permit from another firm. This strategy was used in the 1990s to reduce the emission of sulfur dioxide that many argue caused acid rain. This plan was also similar to the cap-and-trade requirements imposed by the Kyoto Treaty of 1997, which the Senate had never ratified in part because China, India, and other growing economies were not bound by it.

Some critics of the 2009 bill argued that it allowed firms to pay money in order to pollute and was not an efficient method to reduce pollution. Many argued that it should be replaced by a tax on carbon. Other critics said it would only work if the permits were auctioned off (instead, the plan allowed the government to give most away), that it required an unrealistically large decrease in carbon dioxide (85 percent by 2050), and that the decreased emissions would impose taxes on Americans and slow economic growth.

**FIGURE 13-3** Partisan Differences on Global Warming

**Source:** Jocelyn Kiley, “Ideological Divide over Global Warming as Wide as Ever,” Pew Research Center, June 16, 2015.

Despite the efforts of a small bipartisan group of senators, the bill did not come to a vote in their chamber. The White House was focused on passing health care reform, and the president’s advisers were divided over how much the president should engage in the legislative negotiations about the environmental bill. Then the Senate majority leader, Democrat Harry Reid of Nevada, declared that immigration reform needed to pass before environmental reform—an effort to win support from immigration activists in his home state, where he faced a tough though ultimately successful reelection campaign. Finally, the disastrous oil spill in the Gulf of Mexico doomed any prospects of passing legislation that had promised, with White House support, an expansion of offshore oil drilling in return for capping carbon emissions.<sup>18</sup>

After his failure to make headway on one of his signature campaign issues, President Obama pursued environmental

reforms through regulation instead of legislation. For example, the EPA tightened regulations on coal power plants, which are a large producer of greenhouse gases. These recent rules include tougher emissions standards and new limits on mining in federal lands, though these regulations are currently being challenged in court.<sup>19</sup> U.S. leaders—including President Obama and Secretary of State John Kerry—also pushed for new global agreements, including the landmark 2015 Paris Climate Accords, which pledge nations around the world to slow the growth of greenhouse gas emissions.

Over the last four decades, the United States has constructed the most comprehensive and complicated body of environmental laws and regulations in the world. On such issues as endangered species (entrepreneurial), auto pollution (majoritarian), acid rain (interest group), and agricultural pesticides (client), environmental policies arose, persisted, and changed through one or more of the four types of politics we have been discussing.

### Endangered Species: Entrepreneurial Politics

Passed in 1973, the Endangered Species Act (ESA) forbids buying or selling a bird, fish, animal, or plant the government regards as “endangered”—that is, likely to become extinct unless it receives special protection—or engaging in any economic activity (such as building a dam or running a farm) that would harm an endangered species. There have been more than 600 species on the protected list; about half are plants. The regulations forbid not only killing a protected species but also adversely affecting its habitat.

The ESA is run by the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration. They can add species to the endangered or threatened list on their own accord or in response to a private petition. Trafficking in an endangered species can lead to criminal penalties; fines



Spencer Platt/Getty Images

**IMAGE 13-4** U.S. Secretary of State John Kerry addresses world leaders while negotiating the Paris Climate Accords.

may be imposed for managing private land in ways that might harm a species. Several species such as bald eagles, grizzly bears, gray wolves, and sea otters have increased in number since being listed; and a few, such as bald eagles and gray wolves, have been taken off the list.

Entrepreneurial politics often characterize these debates. For example, wood product companies and loggers want access to forests under the control of the U.S. Forest Service. Though only a small fraction of all cut timber comes from these forests and most of the U.S. forest system is already off-limits to logging, environmentalists want further restrictions—especially to prevent clear-cutting (cutting down all the trees in a given area) and to prevent harvesting trees from the old-growth forests of Oregon and Washington. But Congress generally has supported the timber industry, ordering the Forest Service to sell harvesting rights at below-market prices, in effect subsidizing the industry. Some activists have worked to convert this client politics into entrepreneurial politics by demanding that clear-cutting in certain forests be stopped in order to protect endangered species, such as the spotted owl.

### **Pollution from Automobiles: Majoritarian Politics**

The Clean Air Act of 1970 imposed tough restrictions on the amount of pollutants that could come out of automobile tailpipes. Indeed, most of the debate over the bill centered on that issue.

Initially, the auto emissions control rules followed the pattern of entrepreneurial politics: an aroused public with media support demanded that automobile companies be required to make less-polluting cars. It seemed to be “the public” against “the interests,” and the public won. By 1975, new cars would have to produce 90 percent less of two pollutants (hydrocarbons and carbon monoxide), and by 1976 achieve a 90 percent reduction in another (nitrous oxides). This was a tall order. There was no time to redesign automobile engines or to find an alternative to the internal combustion engine; it would be necessary to install devices, called catalytic converters, on exhaust pipes that would transform pollutants into harmless gases.

But a little-noticed provision in the 1970 law soon shoved the battle over automobile pollution into the arena of majoritarian politics. That provision required states to develop land-use and transportation rules to help attain air quality standards. In practice, this meant that in any area where smog was still a problem, even after emission controls had been placed on new cars, there would have to be rules restricting the public’s use of cars. There was no way for cities such as Denver, Los Angeles, and New York to get rid of smog just by requiring people to buy less-polluting cars; the increase in the number of cars or in the number of miles driven in those places outweighed the gain from making the average car less polluting. That meant the government would have to impose such unpopular measures as bans on downtown parking, mandatory use of buses and carpools, and even gasoline rationing. But efforts to do this failed. Popular opposition to such rules was too great, and the few such rules put into place didn’t work. Congress reacted by

postponing the deadlines by which air quality standards in cities would have to be met; the EPA reacted by abandoning any serious effort to tell people when and where they could drive.<sup>20</sup>

Even the effort to clean up the exhausts of new cars ran into opposition. Some people didn’t like the higher cost of cars with catalytic converters; others didn’t like the loss in horsepower these converters caused (in fact, many people disconnected them). The United Auto Workers union began to worry that antismog rules would hurt the U.S. auto industry and cost them their jobs. Congress took note of these complaints and decided that despite a lot of effort, new cars could not meet the 90 percent emission reduction standard by 1975–1976, and so in 1977 it amended the Clean Air Act to extend these deadlines by up to six years.

When revised again in 1990, the Clean Air Act set new, tougher auto emission control standards—but it pushed back the deadline for compliance. It reiterated the need for getting rid of smog in the smoggiest cities and proposed a number of ways to do it—but it set the deadline for compliance in the worst area (Los Angeles) at 20 years in the future.

Most clean-air laws passed since 1990 have targeted particular industries. For example, in 2004 the Bush administration approved a new measure to reduce emissions dramatically from heavy-use diesel engines used in construction, agricultural, and other industrial machinery. The public will support such tough environmental laws when somebody else pays or when the costs are hidden (as in the price of a car); it will not give as much support when it believes it is paying, especially when the payment takes the form of changing how and when it uses the family car.

### **Acid Rain: Interest-Group Politics**

Sometimes the rain, snow, or dust particles that fall onto the land are acidic. This is called *acid rain*. In the 1970s, policy-makers began to debate policies to deal with it. As everyone acknowledged, one source of acid precipitation is burning fuel such as certain types of coal that contain a lot of sulfur. Some of the sulfur (along with nitrogen) will turn into sulfuric or nitric acid as it comes to earth. Steel mills and electric power plants that burn high-sulfur coal are concentrated in the Midwest and Great Lakes regions of the United States. The prevailing winds tend to carry those sulfurous fumes eastward, where some fall to the ground.

That much was certain. Everything else about the issue, however, was surrounded by controversy. Many lakes and rivers in the eastern United States and in Canada had become more acidic, and some forests in these areas had died back. Some part of this was the result of acid rain from industrial smokestacks, but some part of it was also the result of naturally occurring acids in the soils and rainfall. How much of the acidification is man-made and how much is a result of the actions of Mother Nature was a matter of dispute. Some lakes were not affected by acid rain; some were. Why were some affected more than others?

Each side in the debate mustered its favorite experts. They provided some support for each side in what became a fierce interest-group battle. Residents of Canada and New England complained bitterly of the loss of forests and the



acidification of lakes, blaming it on Midwestern smokestacks. Midwestern businesses, labor unions, and politicians denied that their smokestacks were the major cause of the problem (if, indeed, there was a problem) and argued that, even if they were the cause, they shouldn't have to pay the cost of cleaning up the problem.

An attempt to deal with the issue in 1977 reflected the kind of bizarre compromises that sometimes result when politically opposed forces must be reconciled. There were essentially two alternatives. One was to require power plants to burn low-sulfur coal. This would undoubtedly cut back on sulfur emissions, but it would cost money because low-sulfur coal is mined mostly in the West, hundreds of miles away from the Midwestern coal-burning industries. The other way would be to require power plants to install scrubbers—complicated and very expensive devices that would take sulfurous fumes out of the gas before it came out of the smokestack. In addition to their cost, the trouble with scrubbers was that they didn't always work and that they generated a lot of unpleasant sludge that would have to be hauled away and buried somewhere. Their great advantage, however, was that they would allow Midwestern utilities to continue their practice of using cheap, high-sulfur coal.

Congress voted for the scrubbers for all new coal-burning plants, even if they burned low-sulfur coal. In the opinion of most economists, this was the wrong decision,<sup>21</sup> but it had four great political advantages. First, the jobs of miners in high-sulfur coal mines would be protected. They had powerful allies in Congress. Second, environmentalists liked scrubbers, which they seemed to regard as a definitive, technological “solution” to the problem, an approach far preferable to relying on incentives to induce power plants to buy low-sulfur coal. Third, scrubber manufacturers liked the idea, for obvious reasons. Finally, some eastern governors liked scrubbers because if all new plants had to have them, it would be more costly, and thus less likely, for existing factories in their states to close down and move to the West.

The 1977 law in effect required scrubbers on all new coal-burning plants—even plants located right next to mines where they could get low-sulfur coal. As two scholars later described the law, it seemed to produce “clean coal and dirty air.”<sup>22</sup> The 1977 bill did not solve much. Many of the scrubbers, as predicted, didn't work very well. And there remained the question of what to do about existing power plants and factories.

When a solution was finally agreed upon, it was a compromise. President Bush the elder proposed a two-step regulation. In the first phase, 111 power plants would be required to reduce their emission of sulfur by a fixed amount. They could decide for themselves how to do it: buy low-sulfur coal, install scrubbers, or use some other technology. This would be done by 1995. In the second phase, with a deadline in the year 2000, there would be sharper emission reductions for many more plants, and this would probably require the use of scrubbers. To create some flexibility in how much each utility must cut its emissions, a system of sulfur dioxide allowances that could be bought and sold was established. This compromise became part of the Clean Air Act of 1990.

In the mid-2000s, interest groups, advocates, and experts on all sides of the issue were once again poised to battle each other over new and proposed changes to the relevant parts of several different environmental laws. They did, but by 2010, the groups arguing for maintaining the policies were supported by longitudinal data from the national program that monitors the composition of precipitation. The data indicated that, though the problem was still far from solved, since 1994 there had been a dramatic decrease in acid rain falling in the parts of the country where the problem had been most severe—and that decrease was achieved largely without the adverse economic and other impacts that the critics had been predicting since the 1977 law took effect.<sup>23</sup> Still, the interest-group politics of the issue continued just the same, including political battles in 2011 over efforts by the EPA to bolster anti-acid rain regulatory enforcement.

## Agricultural Pesticides: Client Politics

Some client groups have so far escaped this momentum. One such group is organized farmers, who more or less have successfully resisted efforts to restrict the use of pesticides or to control the runoff of pesticides from farmlands.

For a while, it seemed as though farmers would also fall before the assaults of policy entrepreneurs. When Rachel Carson published *Silent Spring* in 1962,<sup>24</sup> she set off a public outcry about the harm to wildlife caused by the indiscriminate use of DDT, a common pesticide. In 1972, the EPA banned the use of DDT.

That same year, Congress directed the EPA to evaluate the safety of *all* pesticides (herbicides, insecticides, fungicides, and others) on the market; unsafe ones were to be removed. However, that was easier said than done. By the late 1970s, there were more than 50,000 pesticides in use, with 5,000 new ones introduced every year.<sup>25</sup> Testing all of these chemicals proved to be a huge, vastly expensive, and very time-consuming job, especially since any health effects on people could not be observed for several years. Pesticides have many beneficial uses; therefore, the EPA had to balance the gains and the risks of using a given pesticide and compare the relative gains and risks of two similar pesticides.

In 2004, Congress directed the EPA to expand and improve its pesticides regulation. Again, that would be a tall order. As summarized in a 2011 EPA report, today in America there are some 112 pesticides producers and about 13,000 pesticides distributors; and about \$12 billion a year is spent on pesticides by about 78 million households and 1.2 million farms.<sup>26</sup>

The client politics of the issue makes the EPA's huge regulatory task even harder. American farmers are the most productive in the world, and most of them believe they cannot achieve that output (and thus their present incomes) without using pesticides. These farmers are well organized to express their interests and well represented in Congress, especially on the House and Senate Agricultural Committees. Complicating matters is the fact that the subsidies the taxpayers give to farmers often encourage them to produce more food than they can sell, and thus to use more pesticides than they really need. Though many of these chemicals

do not remain in the crops harvested, large amounts sink into the soil, contaminating water supplies. But these problems are largely invisible to the public and are much harder to dramatize than the discovery of a toxic waste dump like that at Love Canal, New York.

Though opposed by environmental organizations, farm groups generally have been successful at practicing client politics. Even with the aforementioned 2004 mandate to

expand and improve pesticides regulation, now, as when the effort began, the EPA's budget for reviewing pesticides has been kept small. Very few pesticides have been taken off the market, and those that have been removed have tended to be ones that, because they were involved in some incident receiving heavy media coverage—such as the effect of DDT on birds—were decided through entrepreneurial politics.

## LEARNING OBJECTIVES .....

### 13-1 Explain how America's social welfare policies differ from those of many other modern democracies, and why some programs are politically protected while others are politically imperiled.

America's social-welfare programs differ in four main ways. First, Americans have taken a more restrictive view of who is entitled to or "deserves" to benefit from government assistance. Second, America was slower to embrace the need for the "welfare state" and, in turn, slower to adopt and enact relevant policies and programs. Third, state governments have played a large role in administering or co-funding many "national" social welfare measures (e.g., Medicaid). Fourth, nongovernmental organizations, both for-profit firms and nonprofit groups (secular as well as religious), have played a large role in administering Washington's social welfare initiatives.

Political support for social-welfare programs depends primarily on who benefits directly, or who is perceived to benefit directly. For example, Social Security and Medicare benefit almost all people who have reached a certain age, while the Food Stamps program—like the old AFDC program's successor, TANF—benefits only people with low incomes. The

first type of social welfare program has no means test (they are available to everyone without regard to income), while the second type is means-tested (only people who fall below a certain income level are eligible). The first type represents majoritarian politics and is almost always politically protected; the second type represents client politics and is often politically imperiled. Medicaid, the federal-state health program, is means-tested, but it has as beneficiaries not only low-income persons but also the aged and the disabled. It mixes majoritarian and client politics, making it less politically sacrosanct than Social Security or Medicare, but more so than the Food Stamps program, TANF, and other means-tested programs.

### 13-2 Explain the politics that drive environmental programs.

While entrepreneurial politics figure prominently in environmental policy dynamics, including on an issue like protecting endangered species, there are environmental issues in each "box," like pollution from automobiles (majoritarian), acid rain (interest group), and agricultural pesticides (client politics). The same can be said for social welfare, business regulation, and other domestic policies and programs.

## TO LEARN MORE .....

#### Nonpartisan Reviews of Public Policy Issues:

[www.publicagenda.org](http://www.publicagenda.org)

[www.people-press.org](http://www.people-press.org)

#### Selected Social Welfare Programs:

Social Security: [www.ssa.gov](http://www.ssa.gov)

Medicare and Medicaid: [www.cms.gov](http://www.cms.gov)

TANF: [www.acf.hhs.gov/programs/ofa](http://www.acf.hhs.gov/programs/ofa)

#### Selected Federal Agencies:

Environmental Protection Agency: [www.epa.gov](http://www.epa.gov)

National Labor Relations Board: [www.nlrb.gov](http://www.nlrb.gov)

Occupational Safety and Health Administration:  
[www.osha.gov](http://www.osha.gov)

Allen, Will. *The Good Food Revolution: Growing Healthy Food, People, and Communities*. New York: Gotham, 2012. An account by a former professional basketball player and fast-food executive who built an "urban farm" program that employs sustainable food cultivation strategies, creates local jobs, promotes healthier eating habits, and has been replicated in many cities all across the country.

Derthick, Martha. *Policymaking for Social Security*. Washington, D.C.: Brookings Institution, 1979. A detailed analysis of how the Social Security program grew during its first four decades.

Gore, Al. *Earth in the Balance*. Boston: Houghton Mifflin, 2000. Revised edition of the book on the environment first written when Gore was a senator.

Heclo, Hugh. *Modern Social Politics in Britain and Sweden*. New Haven, CT: Yale University Press, 1974. Classic comparative analysis of how social welfare programs came to Britain and Sweden.

Kingdon, John W. *Agendas, Alternatives, and Public Policies*. Boston: Little, Brown, 1984. An insightful account of how domestic issues, especially those involving health and transportation, get on (or drop off) Washington's political agenda.

Mead, Lawrence M. *From Prophecy to Charity: How to Help the Poor*. Washington, D.C.: American Enterprise Institute, 2011. Argues that the work-based welfare reform programs that succeeded AFDC have been largely successful and prescribes more "paternalistic programs" plus a wider role for charities in administering antipoverty policies.

Monsma, Stephen V. *Putting Faith in Partnerships: Welfare-to-Work in Four Cities*. Ann Arbor: University of Michigan Press, 2004. A careful study of the six different types of organizations that administer welfare-to-work programs in big cities.

Rosenbaum, Walter A. *Environmental Politics and Policy*, 8th ed. Washington, D.C.: Congressional Quarterly Press, 2010. Analyses of the politics of air and water pollution, the use of chemicals, and other environmental issues.

Vogel, David. *National Style of Regulation: Environmental Policy in Great Britain and the United States*. Ithaca, NY: Cornell University Press, 1986. An explanation of why environmental politics in America tends to be adversarial.

Washington Post Staff. *Landmark: The Inside Story of America's New Health Care Law and What It Means for All of Us*. New York: Public Affairs, 2010. A lively journalistic account of the politics that produced the Patient Protection and Affordable Care Act of 2010.

Wilson, James Q., ed. *The Politics of Regulation*. New York: Basic Books, 1980. Analyzes regulatory politics in nine agencies and provides a more detailed statement of the theory of policymaking politics presented in the text.





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## CHAPTER 14

# Foreign and Military Policy

### LEARNING OBJECTIVES

- 14-1** Summarize the different types of politics involved in American foreign policy.
- 14-2** Discuss the constitutional and legal context for making American foreign policy.
- 14-3** Explain how political elites and public opinion influence American foreign policy.
- 14-4** Explain the key challenges that the United States faces in foreign affairs and defense politics today.



Every American knows we struggle against terrorists—that is, against private groups that attack unarmed civilians. But this is not a recent development.

## THEN

Between 1801 and 1805, President Thomas Jefferson sent our navy to fight the Barbary Pirates who operated out of various North African countries against merchant shipping in the Mediterranean. They were sponsored by the Ottoman Empire, a Muslim regime based in Turkey. In the 19th century, American warships did battle with pirates in the Caribbean and along our Atlantic coast. Some terrorists operated inside the country. John Brown fought against slavery by raiding the supplies of the American military at Harper's Ferry. One might sympathize with his antislavery views, but he and his followers killed innocent civilians. He was caught and hanged.

After the Civil War, the Ku Klux Klan (KKK) was formed to block the emancipation of blacks by lynching them and shooting into their homes as well as the homes of sympathetic whites. The first KKK, created in the 19th century, was replaced by a second one created in the 20th; each of them enrolled several million members and continued the policy of harassment and murder. Although a KKK still exists, it only has a few thousand members and rarely commits an illegal act. To defeat the Klan, in 1871 Congress passed the "Klan Act," which gave the president the power to suspend the writ of habeas corpus in any state where ordinary law enforcement procedures were unavailable, and afforded people the right to sue officials who violated their rights.

In the 1960s and 1970s, the Weather Underground, a radical leftist organization, bombed police stations, the Pentagon, and a townhouse; threw Molotov cocktails

through a judge's window; and robbed a Brink's armored car. Though several of its leaders have abandoned radical action and taken respectable jobs, they denounce conservatives in and out of government in the strongest language.

## NOW

The 9/11 attacks by hijacked aircraft against the World Trade Center and the Pentagon ushered in a new phase and represented a much more deadly form of terrorism than what we have encountered in the past. This attack—as well as the 1998 bombing of two American embassies and the 2000 attack on the USS *Cole*—were carried out by al Qaeda, a radical Islamic group founded by Osama bin Laden and his colleagues. ("Al Qaeda" means "the base.") But these attacks were different from that on Pearl Harbor. The latter attack had, so to speak, a return address; we knew who did it and where they lived. But 9/11 had no return address; it was a terrorist attack waged by small groups that could be located anywhere.

In response, the United States launched an attack on Afghanistan, where the ruling party, the Taliban, had supported and helped train al Qaeda, and passed the Patriot Act, which improved cooperation among intelligence and law enforcement agencies. The federal government amended the Foreign Intelligence Surveillance Act (FISA) that makes it possible for the government to eavesdrop on communications that cross our national borders. In 2011, Osama bin Laden, the founder of al Qaeda, was found in Pakistan and killed by American special forces operatives.

Such choices must be made in a democracy, and some observers think democratic politics make managing foreign and military policy harder. Tocqueville said the conduct of



Amir Qureshi/AFP/Getty Images

**IMAGE 14-1** In May 2011, Osama bin Laden was killed by U.S. special forces in the house behind this wall, located in Abbottabad, Pakistan.

foreign affairs requires precisely those qualities most lacking in a democratic nation: “A democracy can only with great difficulty regulate the details of an important undertaking, persevere in a fixed design, and work out its execution in spite of serious obstacles. It cannot combine its measures with secrecy or await their consequences with patience.”<sup>1</sup> In plain language, a democracy is forced to play foreign policy poker with its cards turned up. As a result, aggressors from Adolf Hitler to Saddam Hussein can bluff a democracy, but the reverse is far more difficult.

Other writers, however, disagree with Tocqueville. To them, the strength of democracy is that, though it rarely if ever wages an unjustified war on another country, its people, when mobilized by the president, will support our overseas engagements even when many deaths occur.<sup>2</sup>

## 14-1 Kinds of Foreign Policy

The majoritarian component of foreign policy includes those decisions (and nondecisions) perceived to confer widely distributed benefits and impose widely distributed costs. The decision to go to war is an obvious example of this—along with the establishment of military alliances with Western Europe, the negotiation of a nuclear test ban treaty or a strategic arms limitation agreement, the response to the placement of Soviet offensive missiles in Cuba, and the opening of diplomatic relations with the People’s Republic of China. These may be good or bad policies, but the benefits and costs accrue to the nation generally.

Some argue that the costs of many of these policies are in fact highly concentrated—for example, soldiers bear the burden of a military operation—but that turns out, on closer inspection, not to shape the positions that people take on issues of war and peace. Though soldiers and their immediate families bear the costs of war to an especially high degree, public opinion surveys taken during the Vietnam War showed that having a family member in the armed forces did not significantly affect how people evaluated the war.<sup>3</sup> There is a sense that, during wartime, we are all in this together.

Foreign policy decisions may also reflect interest-group politics. Tariff decisions confer benefits on certain business firms and labor unions and impose costs on other firms and unions. If tariffs, quotas, or other devices increase the price of Japanese steel imported into this country, this helps the American steel industry and the United Steel Workers of America. On the other hand, it hurts those firms and associated unions that had been purchasing the once-cheap Japanese steel.

Examples of client politics also occur in foreign affairs. Washington often provides aid to American corporations doing business abroad, because the aid helps those firms directly without imposing any apparent costs on an equally distinct group in society. Americans support Israel partly because Jewish organizations back them, and partly because they admire that embattled democracy. Arab Americans organize and convey concerns to the government that can be very different from the pro-Israel arguments.

Who has power in foreign policy depends very much on what kind of foreign policy we have in mind. Where it is of

a majoritarian nature, the president is clearly the dominant figure—and much, if not everything, depends on the president’s beliefs and skills, as well as those of top advisers. Public opinion ordinarily will support, but not guide, this presidential leadership. Woe to the president who forfeits that trust through questionable actions.

When interest group or client politics is involved, Congress plays a much larger role. Although Congress has a subsidiary role in the conduct of foreign diplomacy, the decision to send troops overseas, or the direction of intelligence operations, it has a large role in decisions involving foreign economic aid, the structure of the tariff system, the shipment of weapons to foreign allies, the creation of new weapons systems, and the support of Israel.

And Congress is the central political arena on those occasions when entrepreneurial politics shapes foreign policy. If a multinational corporation is caught in a scandal, congressional investigations shake the usual indifference of politicians to the foreign conduct of such corporations. If presidential policies abroad lead to reversals (as in 1986, when presidential aides sought to trade arms for U.S. hostages in Iran and then use some profits from the arms sales to support the anti-Marxist contras fighting in Nicaragua), Congress becomes the forum for investigations and criticism. At such moments Congress often seeks to expand its power over foreign affairs.

In this chapter, we are concerned chiefly with foreign policy insofar as it displays the characteristics of majoritarian politics. Limiting the discussion in this way permits us to focus on the grand issues of foreign affairs—war, peace, and global diplomacy. It allows us to see how choices are made in a situation in which public majorities support but do not direct policy, in which opinion tends to react to events, and in which interest groups are relatively unimportant.

## 14-2 The Constitutional and Legal Context

The Constitution defines the authority of the president and of Congress in foreign affairs in a way that, as Edward Corwin put it, is an “invitation to struggle.”<sup>4</sup> The president is commander-in-chief of the armed forces, but Congress must authorize and appropriate money for those forces. The president appoints ambassadors, but the Senate must confirm them. The president may negotiate treaties, but the Senate must ratify these by a two-thirds vote. Only Congress may regulate commerce with other nations and “declare” war. (In an early draft of the Constitution, the Framers gave Congress the power to “make” war but changed this to “declare” so that the president, acting without Congress, could take military measures to repel a sudden attack.) Because the president and Congress share power over foreign affairs, conflict between them is to be expected.

Yet almost every American thinks instinctively that the president is in charge of foreign affairs, and what popular opinion supposes, the historical record confirms. Presidents have asserted the right to send troops abroad on their own authority in more than 125 instances. Only five of



## CONSTITUTIONAL CONNECTIONS

### Sending U.S. Troops Abroad

The Constitution divides responsibility for sending U.S. forces abroad between Congress and the president. Article I, Section 8, states, “The Congress shall have Power . . . To declare War,” while Article II, Section 2, says, “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” In *Federalist* No. 69, Alexander Hamilton contrasted this power with that of the British king, saying the executive power would “be much inferior. . . . It would amount to nothing more than the supreme command and direction of the military and naval forces.”

In practice, though, American presidents have sent troops abroad on many occasions without a declaration of war (which Congress has issued in just five cases—the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, World War I, and World War II). After the undeclared wars of Korea and Vietnam, Congress passed the War Powers Resolution over President Richard M. Nixon’s veto to ensure that the president would not send troops abroad indefinitely

without legislative approval. But every president has said the War Powers Resolution is unconstitutional, and the issue almost certainly will not be decided in the courts, as that would require an actual test of the law with Congress ordering the president to bring troops home from a conflict or cutting off funding (both of which would risk danger on the battlefield).

Since the ending of the Cold War, presidents have secured joint resolutions of support from Congress for the use of military force in some, though not all, conflicts. But the Framers of the Constitution called for a much more active congressional role in deciding when to send troops abroad than has happened in practice. Achieving the Framers’ vision likely will require political will from both the legislative and executive branches.

**Sources:** Alexander Hamilton, *The Federalist Papers*: No. 69, “The Real Character of the Executive,” March 14, 1788; Louis Fisher, *Presidential War Power*, 3rd rev. ed. (Lawrence: University Press of Kansas, 2013).

the more than one dozen major wars fought by this country have followed a formal declaration of war by Congress.<sup>5</sup> The State Department, the Central Intelligence Agency, and the National Security Agency are almost entirely “presidential” agencies, with only modest congressional control. The Defense Department, though keenly sensitive to congressional views on weapons procurement and the location of military bases, is very much under the control of the president on matters of military strategy. While the Senate has ratified well over 1,000 treaties signed by the president since 1789, during this period the president also has signed around 7,000 executive agreements with other countries that did not require Senate ratification and yet have the force of law.<sup>6</sup>

### Evaluating the Power of the President

Whether one thinks the president is too strong or too weak in foreign affairs depends not only on whether one holds a domestic or international point of view, but also on whether one agrees or disagrees with his policies. Historian Arthur M. Schlesinger, Jr., thought that President Kennedy exercised commendable presidential vigor when he made a unilateral decision to impose a naval blockade on Cuba to induce the Soviets to remove missiles installed there. However, he viewed President Nixon’s decision to extend U.S. military action in Vietnam into neighboring Cambodia as a deplorable example of the “imperial presidency.”<sup>7</sup> To be sure, there were important differences between these two actions, but that is precisely the point; an office strong enough to do something that one thinks proper is also strong enough to do something that one finds wrong.

The Supreme Court has supported the view fairly consistently that the federal government has powers in the conduct of foreign and military policy beyond those specifically mentioned in the Constitution. The leading decision, rendered in 1936, holds that the right to carry out foreign policy is an inherent attribute of any sovereign nation:

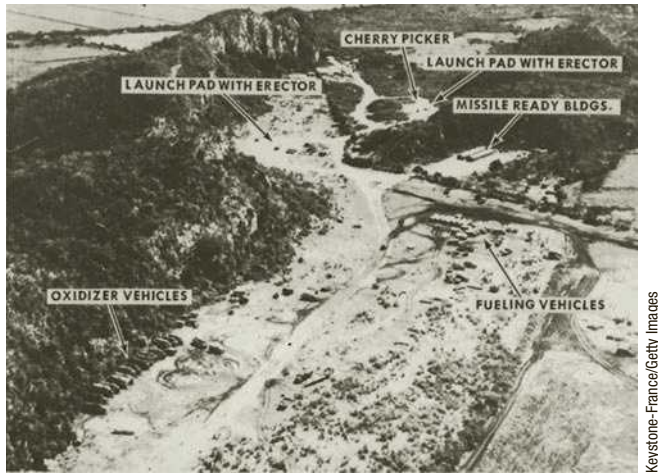
*The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.*<sup>8</sup>

The individual states have few rights in foreign affairs.

Moreover, the Supreme Court has been reluctant to intervene in disputes over the conduct of foreign affairs. When various members of Congress brought suit challenging the right of President Nixon to enlarge the war in Vietnam without congressional approval, the court of appeals handled the issue, as one scholar was later to describe it, “with all the care of porcupines making love.” The Court said it was a matter for the president and Congress to decide and that if Congress was unwilling to cut off the money to pay for the war, it should not expect the courts to do the job for it.<sup>9</sup>

The Supreme Court upheld the extraordinary measures taken by President Lincoln during the Civil War and refused to interfere with the conduct of the Vietnam War by Presidents Johnson and Nixon.<sup>10</sup> After Iran seized American hostages in 1979, President Carter froze Iranian assets in this country. To win the hostages’ freedom, the president later agreed to





Keystone-France/Getty Images

**IMAGE 14-2** In 1962, President Kennedy forced the Soviet Union to withdraw the missiles it had placed in Cuba after their presence was revealed by aerial photography.

return some of these assets and to nullify claims on them by American companies. The Court upheld the nullification because it was necessary for the resolution of a foreign policy dispute.<sup>11</sup>

How great the deference to presidential power may be is illustrated vividly by the actions of President Franklin Roosevelt in ordering the army to move more than 100,000 Japanese Americans—the great majority of them born in this country and citizens of the United States—from their homes on the West Coast to inland “relocation centers” for the duration of World War II. Though this action was a wholesale violation of the constitutional rights of U.S. citizens and was unprecedented in American history, the Supreme Court upheld the relocation order—deciding that with the West Coast vulnerable to attack by Japan, the president was within his rights to declare that people of Japanese ancestry might pose a threat to internal security.<sup>12</sup> (No Japanese American was ever found guilty of espionage or sabotage.) One of the few cases in which the Court denied the president broad wartime powers occurred in 1952, when it decided 6-3 to reverse President Truman’s seizure of the steel mills—a move that he had made in order to avert a strike that, in his view, would have imperiled the war effort in Korea.<sup>13</sup>

## Checks on Presidential Power

If there is a check on the powers of the federal government or the president in foreign affairs, it is chiefly political rather than constitutional. The most important check is Congress’s control of the purse strings. In addition, Congress has imposed three important kinds of restrictions on the president’s freedom of action, all since Vietnam.

### Limitations on the President’s Ability to Give Military or Economic Aid to Other Countries

Between 1974 and 1978, the president could not sell arms to Turkey because of a dispute between Turkey and Greece over control of the island of Cyprus. The pressure on Congress from groups supporting Greece was much stronger

than that from groups supporting Turkey. In 1976, Congress prevented President Ford from giving aid to the pro-Western faction in the Angolan civil war. Until the method was declared unconstitutional, Congress for many years could use a legislative veto, a resolution disapproving of an executive decision (see Chapter 11), to block the sale by the president of arms worth more than \$25 million to another country.

## The War Powers Act

Passed in 1973 over a presidential veto, this law placed the following restrictions on the president’s ability to use military force:

- The president must report in writing to Congress within 48 hours after introducing U.S. troops into areas where hostilities have occurred or are imminent.
- Within 60 days after troops are sent into hostile situations, Congress must, by declaration of war or other specific statutory authorization, provide for the continuation of hostile action by U.S. troops.
- If Congress fails to provide such authorization, the president must withdraw the troops (unless Congress has been prevented from meeting as a result of an armed attack).
- If Congress passes a concurrent resolution (which the president may not veto) directing the removal of U.S. troops, the president must comply.

Until recently the War Powers Act has had very little influence on American military actions. Since its passage, every president—Ford, Carter, Reagan, Bush (41), Clinton, Bush (43), and Obama—has sent American forces abroad without any explicit congressional authorization. (Bush 41 asked for that support when he attacked Iraq and, by a narrow margin, received it.) No president has acknowledged that the War Powers Act is constitutional. In its 1983 decision in the *Chadha* case, the Supreme Court struck down the legislative veto, which means that this section of the act is already in constitutional trouble.<sup>14</sup>

Even if the act is constitutional, politically it is all but impossible to use. Few members of Congress would challenge a president who carried out a successful military operation (e.g., those in Grenada, Panama, and at least initially in Afghanistan). More might challenge the president if the military action were in trouble after a while, but the easiest way to do that would be to cut off funding for the operation. But even during the Vietnam War, a conflict that preceded the War Powers Act, Congress never stopped military appropriations—even though many members were critics of U.S. policy.

However, in 2011—after the United States, working with the North Atlantic Treaty Organization (NATO), used military resources to support rebels attacking the despotic regime of Muammar Gaddafi in Libya—Republicans in Congress (who in the past had shown little interest in the War Powers Act) attacked President Obama over his failure to comply with it. Then in 2013, after Syria used chemical weapons against opposition rebel forces, President Obama said he would not authorize military action without congressional support, but Congress demurred.





**IMAGE 14-3** Following the attack on Pearl Harbor, in 1942, President Roosevelt ordered that all Japanese Americans living on the West Coast be interned in prison camps.

## Intelligence Oversight

Owing to the low political stock of President Nixon during the Watergate scandal and the revelations of illegal operations by the Central Intelligence Agency (CIA) within the United States, Congress required that the CIA notify appropriate congressional committees about any proposed covert action (between 1974 and 1980 it had to notify *eight* different committees). Today it must keep two groups, the House and the Senate Intelligence Committees, “fully and currently informed” of all intelligence activities, including covert actions. The committees do not have the authority to disapprove such actions.

However, from time to time Congress will pass a bill blocking particular covert actions. This happened when the Boland Amendment (named after its sponsor, Representative Edward Boland) was passed on several occasions between 1982 and 1985. Each version of the amendment prevented, for specifically stated periods, intelligence agencies from supplying military aid to the Nicaraguan contras.

The 9/11 terrorist attacks left everyone wondering why our intelligence agencies had not foreseen them. After the attacks, there was an investigation to find out why the CIA had not warned the country of this risk. In an effort to improve matters, Congress passed and President Bush signed a law creating the Office of the Director of National Intelligence (DNI). It was designed to coordinate the work of the CIA, the FBI, the Defense Intelligence Agency (DIA), and the intelligence units of several other government agencies. The DNI replaced the director of the CIA as the president’s chief

adviser. Evaluating how much real coordination takes place is difficult, as the DNI’s office is another large bureaucracy placed on top of other big ones.

## 14-3 Making Foreign Policy

From the time that Thomas Jefferson took the job in Washington’s first administration until well into the 20th century, foreign policy was often made and almost always carried out by the Secretary of State. No more. When America became a major world power during and after World War II, our commitments overseas expanded dramatically. With that expansion two things happened. First, presidents began to put foreign policy at the top of their agenda and to play a larger role in directing it. Second, that policy was shaped by the scores of agencies (some brand new) that had acquired overseas activities. While presidents and executive agencies now set the direction for American foreign policy, public opinion also shapes the broad outlines of American interests and priorities.

## Political Elites

Today, Washington, D.C., has not one State Department but many. The Defense Department has military bases and military advisers abroad. The Central Intelligence Agency has intelligence officers abroad, most of them assigned to “stations” that are part of the American embassy but not under the full control of the American ambassador there. The Departments of Agriculture, Commerce, and Labor have missions abroad.

The Federal Bureau of Investigation and the Drug Enforcement Administration have agents abroad. The Agency for International Development has offices to dispense foreign aid in host countries. The U.S. Information Agency runs libraries, radio stations, and educational programs abroad.

Every new secretary of state announces bravely that he or she is going to “coordinate” and “direct” this enormous foreign policy establishment. He or she never does. The job is too big for any one person, and most of these agencies owe no political or bureaucratic loyalty to the secretary of state. If anyone is to coordinate them, it will have to be the president. But the president cannot keep track of what all these organizations are doing in the more than 190 nations and 50 international organizations where we have representatives, or in the more than 800 international conferences that we attend each year.

So the president now has a staff to coordinate foreign policy. That staff is part of the National Security Council (NSC—a committee created by statute and chaired by the president) whose members include by law the vice president and the secretaries of state and defense, and by custom the director of national intelligence (DNI), the chairman of the Joint Chiefs of Staff, and often the attorney general. Depending on the president, the NSC can be an important body in which to hammer out foreign policy. Attached to it

is a staff headed by the national security adviser. That staff, which usually numbers a few dozen men and women, can be (again, depending on the president) an enormously powerful instrument for formulating and directing foreign policy.

The way in which the machinery of foreign policymaking operates has two major consequences for the substance of that policy. First, as former secretary of state George Shultz asserted, “It’s never over.” Foreign policy issues are endlessly agitated, rarely settled. The reason is that the rivalries *within* the executive branch intensify the rivalries *between* that branch and Congress. In ways already described, Congress has steadily increased its influence over the conduct of foreign policy. Anybody in the executive branch who loses out in a struggle over foreign policy can take his or her case (usually by means of a well-timed leak) to a sympathetic member of Congress, who then can make a speech, hold a hearing, or introduce a bill.

Second, the interests of the various organizations making up the foreign policy establishment profoundly affect the positions that they take. Because the State Department has a stake in diplomacy, it tends to resist bold or controversial new policies that might upset established relationships with other countries. Part of the CIA has a stake in gathering and analyzing information; that part tends to be skeptical of other agencies’ claims that their overseas operations are succeeding. Another part of the CIA conducts covert operations abroad; it tends to resent or ignore the intelligence analysts’ skepticism. The air force flies airplanes and so tends to be optimistic about what can be accomplished through the use of air power in particular and military power in general; the army, on the other hand, which must fight in the trenches, is often dubious about the prospects for military success. During the American war in Iraq, the conflict between the CIA and the Defense Department was great, with each side leaking information to the press.

Americans often worry that their government is keeping secrets from them. In fact, there are no secrets in Washington—at least not for long.



## LANDMARK CASES

### Foreign Affairs

- ***Curtiss-Wright Export Corp. v. United States (1936)*:** American foreign policy is vested entirely in the federal government, where the president has plenary power.
- ***Korematsu v. United States (1944)*:** Sending Japanese Americans to relocation centers during World War II was based on an acceptable military justification.
- ***Youngstown Sheet & Tube Co. v. Sawyer (1952)*:** The president may not seize factories during wartime without explicit congressional authority even when they are threatened by a strike.
- ***Hamdi v. Rumsfeld (2004)*:** An American citizen in jail because he allegedly joined the Taliban extremist group should have access to a “neutral decision maker.”
- ***Rasul v. Bush (2004)*:** Foreign nationals held at Guantanamo Bay because they are believed to be terrorists have a right to bring their cases before an American court.
- ***Hamdan v. Rumsfeld (2006)*:** The executive branch cannot unilaterally set up military commissions to try suspected terrorists; Congress must authorize their creation.
- ***Boumediene v. Bush (2008)*:** Congress may not suspend the writ of habeas corpus for suspected terrorists held at Guantanamo Bay.

## Public Opinion

World War II was the great watershed event in American foreign policy. Before that time, a clear majority of the American public opposed active involvement in world affairs. The public believed the costs of such involvement were substantially in excess of the benefits; and only determined, skillful leaders were able, as was President Roosevelt during 1939–1940, to affect in even a limited fashion the diplomatic and military struggles then convulsing Europe and Asia.

In 1937, 94 percent of the American public preferred the policy of doing “everything possible to keep out of foreign wars” to the policy of doing “everything possible to prevent war, even if it means threatening to fight countries that fight wars.” In 1939, after World War II had begun in Europe but before Pearl Harbor was attacked, only 13 percent of Americans polled thought that we should enter the war against Germany. Just a month before Pearl Harbor, only 19 percent felt that the United States should take steps, at the risk of war, to prevent Japan from becoming too powerful.<sup>15</sup> Congress reflected the noninterventionist mood

of the country; in the summer of 1941, with war breaking out almost everywhere, the proposal to continue the draft passed the House of Representatives by only one vote.

The Japanese attack on Pearl Harbor on December 7 changed all that. Not only was the American war effort supported almost unanimously, not only did Congress approve the declaration of war with only one dissenting vote, but World War II—unlike World War I—produced popular support for an active assumption of international responsibilities that continued after the war had ended.<sup>16</sup> Whereas after World War I a majority opposed U.S. entry into the League of Nations, after World War II a clear majority favored our entry into the United Nations.<sup>17</sup>

This willingness to see the United States remain a world force persisted. Even during the Vietnam War, the number of people thinking that we should “keep independent” in world affairs as opposed to “working closely with other nations” rose from 10 percent in 1963 to only 22 percent in 1969.<sup>18</sup> In 1967, after more than two years of war in Vietnam, 44 percent of Americans believed that this country had an obligation to “defend other Vietnams if they are threatened by communism.”<sup>19</sup>

Before 9/11, hardly any American thought we should fight a war in Afghanistan, but after that attack we fought exactly that war in order to get rid of the Taliban regime. The Taliban, a group of radical young Muslims, had taken control of that country and allowed Osama bin Laden, the head of al Qaeda, to use the nation as a place to train and

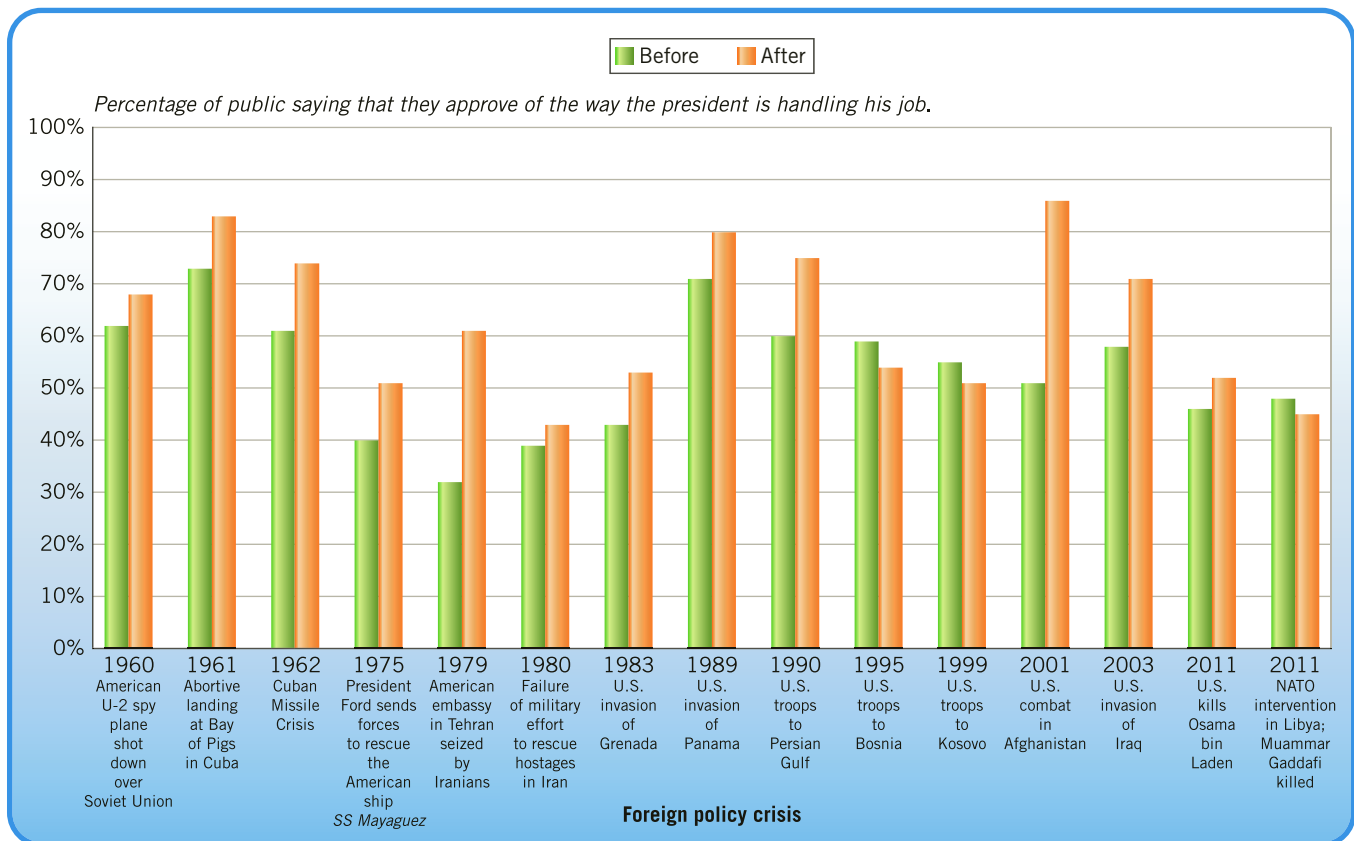
direct terrorists. Though al Qaeda designed and carried out the 9/11 attacks on America, it is not a single organization located in one place and is therefore very difficult to defeat. It is instead a network of terrorist cells found all over the world that is allied with other terrorist groups. Even after bin Laden was killed in 2011, offshoots of al Qaeda, such as the Islamic State of Iraq and Syria (ISIS), continue to wreak destruction.

But the support for an internationalist American foreign policy was, and is, highly general and heavily dependent on the phrasing of poll questions, the opinions expressed by popular leaders, and the impact of world events. Public opinion, while more internationalist than once was the case, is both mushy and volatile. Just prior to President Nixon’s decision to send troops into Cambodia, only 7 percent of the people said they supported such a move. After the troops were sent and Nixon made a speech explaining his move, 50 percent of the public said they supported it.<sup>20</sup> Similarly, only 49 percent of the people favored halting the American bombing of North Vietnam before President Johnson ordered such a halt in 1968; afterward 60 percent of the people said they supported such a policy.<sup>21</sup>

## Backing the President

Much of this volatility in specific opinions (as opposed to general mood) reflects the aforementioned deference to the “commander-in-chief” and a desire to support the United States when it confronts other nations. Figure 14-1 shows

**FIGURE 14-1** Popular Reactions to Foreign Policy Crises



**Source:** Updated from Theodore J. Lowi, *The End of Liberalism* (New York: Norton, 1969), p. 184. Poll data are from Gallup poll and *realclearpolitics.com*. Time lapse between “before” and “after” samplings of opinion was in no case more than one month.

the proportion of people who said that they approved of the way the president was doing his job before and after various major foreign policy events. Almost every foreign crisis increased the level of public approval of the president, often dramatically. The most vivid illustration of this was the Bay of Pigs fiasco, in which an American-supported, American-directed invasion of Cuba by anti-Castro Cuban émigrés was driven back into the sea. President Kennedy accepted responsibility for the aborted project. His popularity *rose*. (Comparable data for domestic crises tend to show no similar effect.)

This tendency to “rally round the flag” operates for some but not all foreign military crises.<sup>22</sup> The rally not only helped Kennedy after the Bay of Pigs, but it also helped Ronald Reagan when he invaded Grenada and George Bush (41) when he sent troops to fight Iraq. But it did not help Bill Clinton when he sent forces to Bosnia or launched bombing attacks on Iraq. If there is an attack on America, then the public typically unites in support of the president. Just before September 11, 2001, George W. Bush’s favorability rating was 51 percent; just after the attack, it was 86 percent.

Sometimes people argue that whatever support a president gets during a military crisis will disappear when American soldiers are killed in battle. But a close study of how casualty rates affect public opinion showed that although deaths tend to reduce how “favorable” people are toward a war, what they then support is not withdrawal but an *escalation* in the fighting to defeat the enemy more quickly. This was true during Korea, Vietnam, and the Persian Gulf War.<sup>23</sup>

In sum, people tend to be leery of overseas military expeditions by the United States—until they start. Then they support them and want to win, even if it means more intense fighting. When Americans began to dislike our involvement in Korea and Vietnam,<sup>24</sup> they did not conclude that we should pull out; they concluded instead that we should do whatever was necessary to win. The invasion of Iraq did not raise large questions for many Americans until terrorist attacks on the American military continued after the Iraqi army had been defeated.

Despite the tendency for most Americans to rally round the flag, for many decades there has been some public opposition to almost any war in which the United States participates. About one-fifth of Americans opposed our invading Iraq, about the same level of opposition to our wars in Korea and Vietnam. Opposition has generally been highest among Democrats, African Americans, and people with a postgraduate degree.<sup>25</sup> For the U.S. intervention in Libya in 2011, just 47 percent of Americans approved of this military action, with 37 percent in opposition.<sup>26</sup>

## Mass Versus Elite Opinion

The public is poorly informed about foreign affairs. It probably has only a vague idea where Kosovo is, how far it is from Baghdad to Kuwait, or why the Palestinians and the Jews disagree about the future of Israel. But that is to be expected. Foreign affairs are, well, foreign. They do not have much to do with the daily lives of American citizens, except during war-time. But since World War II, the public consistently has felt that the United States should play an important international

role.<sup>27</sup> And if our troops go abroad, it is a foolish politician who will try to talk the public out of supporting them.

Political elites, however, have a different perspective. They are better informed about foreign policy issues, but their opinions are more likely to change rapidly. Initially, college-educated people gave *more* support to the war in Vietnam than those without college training; by the end of the war, that support had decreased dramatically. Whereas the average citizen was upset when the United States seemed to be on the *defensive* in Vietnam, college-educated voters tended to be more upset when the United States was on the *offensive*.<sup>28</sup>

Though the average citizen did not want our military in Vietnam in the first place, he or she felt that we should support our troops once they were there. The average person also was deeply opposed to the antiwar protests taking place on college campuses. When the Chicago police roughed up antiwar demonstrators at the 1968 Democratic Convention, public sentiment was overwhelmingly on the side of the police.<sup>29</sup> Contrary to myths much accepted at the time, younger people were *not* more opposed to the war than older ones. There was no “generation gap.”

By contrast, college-educated citizens, thinking at first that troops should be involved, soon changed their minds, decided that the war was wrong, and grew increasingly upset when the United States seemed to be enlarging the war (by invading Cambodia, for example). College students protested against the war largely on moral grounds, and their protests received more support from college-educated adults than from other citizens.

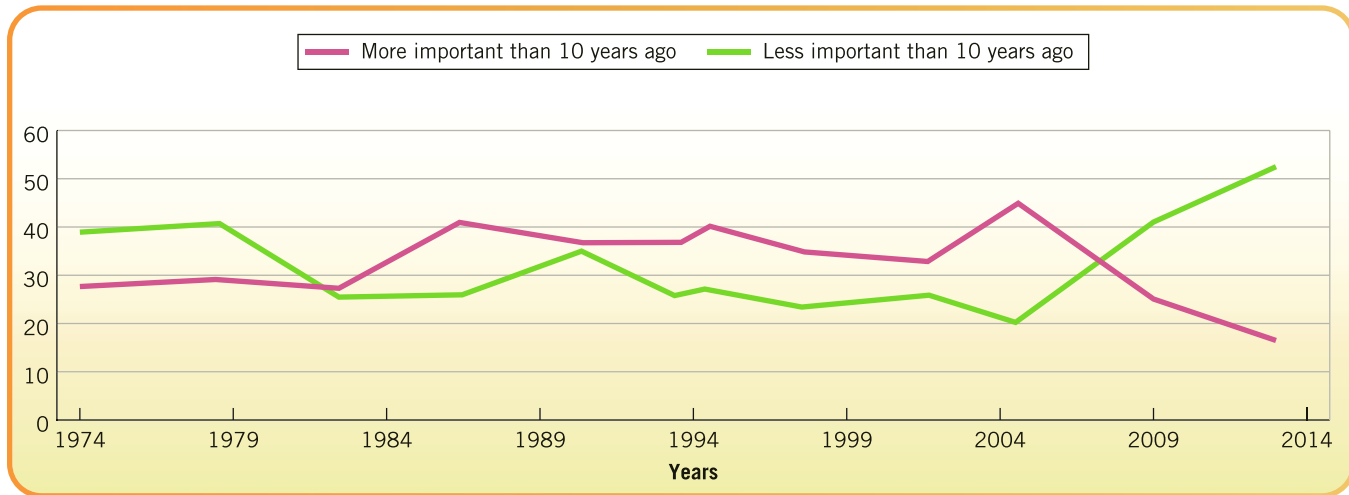
Elite opinion changes more rapidly than public opinion. During the Vietnam War, upper-middle-class people who read several magazines and newspapers regularly underwent a dramatic change in opinion between 1964, when they supported the war, and 1968, when they opposed it. But the views of blue-collar workers scarcely changed at all.<sup>30</sup>

In general the leaders have a more liberal and internationalist outlook than the public; they are more likely to favor giving economic aid to other countries and defending our allies. The public, on the other hand, wants the United States to be less active overseas and worries about protecting the jobs of American workers. Accordingly, it wants the United States to protect American jobs from foreign competition and give less economic aid to other nations. As Figure 14-2 shows, from 2004 to 2014, the percentage of Americans who think the United States is less important and powerful as a world leader than it was a decade ago more than doubled.

## Cleavages Among Foreign Policy Elites

As we have seen, public opinion on foreign policy is permissive and a bit mushy; it supports presidential action without giving it much direction. Elite opinion therefore acquires extraordinary importance. Of course events and world realities are also important, but since events have no meaning except as they are perceived and interpreted, the attitudes and beliefs of people in and out of government who are active in shaping foreign policy often assume decisive importance.



**FIGURE 14-2** Public's View of America as a World Leader

**Source:** Andrew Kohut, “Americans: Disengaged, Feeling Less Respected, But Still See U.S. As World’s Military Superpower,” *Pew Research Center*, April 1, 2014.

**worldviews** A comprehensive opinion of how the United States should respond to world problems.

Contrary to the views of people who think that some shadowy, conspiratorial group of insiders runs our foreign policy, the foreign policy elite in this country is divided deeply. That elite consists not only of those with administrative positions in the foreign policy field (the senior officials of the State Department and the staff of the National Security Council), but also the members and staffs of the key congressional committees concerned with foreign affairs (chiefly the Senate Foreign Relations Committee and the House International Relations Committee) and various private organizations that help shape elite opinion (such as the members of the Council on Foreign Relations and the editors of two important publications, *Foreign Affairs* and *Foreign Policy*). To these must be added influential columnists and editorial writers whose work appears regularly in the national press. One could extend the list by adding ever-wider circles of people with some influence (lobbyists, professors, leaders of veterans’ organizations). But this would complicate without changing the central point: elite beliefs are probably more important in explaining foreign policy than in accounting for decisions in other policy areas.

### How a Worldview Shapes Foreign Policy

These beliefs can be described in simplified terms as **worldviews** (or, as some social scientists put it, as *paradigms*)—basically, comprehensive mental pictures of the critical problems facing the United States in the world and of the appropriate and inappropriate ways of responding to these problems. The clearest, most concise, and perhaps most influential statement of one worldview that held sway for many years was in an article published in 1947 in *Foreign Affairs*, titled “The Sources of Soviet Conduct.”<sup>31</sup> Written by a “Mr. X” (later revealed to be George F. Kennan, director of the Policy Planning Staff of the State Department and thereafter

ambassador to Moscow), the article argued that the Russians were pursuing a policy of expansion that could only be met by the United States’ applying “unalterable counterforce at every point where they show signs of encroaching upon the interests of a peaceful and stable world.” This he called the strategy of “containment,” and it became the governing principle of American foreign policy for at least two decades.

There were critics of the containment policy at the time—Walter Lippmann, in his book *The Cold War*, argued against it in 1947<sup>32</sup>—but the criticisms were less influential than the doctrine. A dominant worldview is important precisely because it prevails over alternative views. One reason it prevails is that it is broadly consistent with the public’s mood. In 1947, when Kennan wrote, popular attitudes toward the Soviet Union—favorable during World War II when Russia and America were allies—had turned quite hostile. In 1946, less than one-fourth of the American people believed Russia could be trusted to cooperate with this country,<sup>33</sup> and by 1948 over three-fourths were convinced the Soviet Union was trying not simply to defend itself, but to become the dominant world power.<sup>34</sup>

Such a worldview was also influential because it was consistent with events at the time; Russia had occupied most of the previously independent countries of Eastern Europe and was turning them into puppet regimes. When governments independent of both the United States and the Soviet Union attempted to rule in Hungary and Czechoslovakia, they were overthrown by Soviet-backed coups. A worldview also becomes dominant when it is consistent with the prior experiences of the people holding it.

### Four Worldviews

Every generation of political leaders comes to power with a foreign policy worldview shaped, in large measure, by the real or apparent mistakes of the previous generation.<sup>35</sup> This pattern can be traced back, some have argued, to the very beginnings of the nation. Frank L. Klingberg traces the

alteration since 1776 between two national “moods” that favored first “extroversion” (or an active, internationalist policy) and then “introversion” (a less active, even isolationist, posture).<sup>36</sup>

Since the 1920s, American elite opinion has moved through four dominant worldviews: isolationism, containment (or antiappeasement), disengagement, and human rights. **Isolationism** was the view adopted as a result of our unhappy experience in World War I. Our efforts to help European allies had turned sour. Thousands of American troops had been killed in a war that had seemed to accomplish little and certainly had not made the world, in Woodrow Wilson’s words, “safe for democracy.” As a result, in the 1920s and 1930s both elite and popular opinion opposed U.S. involvement in European wars.

The **containment** (or antiappeasement) paradigm was the result of World War II. Pearl Harbor was the death knell for isolationism. Senator Arthur H. Vandenberg of Michigan, a staunch isolationist before the attack, became an ardent internationalist not only during but after the war. He later wrote of the Japanese attack on Pearl Harbor on December 7, 1941, “that day ended isolationism for any realist.”<sup>37</sup> At a conference in Munich, efforts of British and French leaders to satisfy Hitler’s territorial demands in Europe had led not to “peace in our time,” as British Prime Minister Neville Chamberlain had claimed, but to ever-greater territorial demands and ultimately to world war. This crisis brought to power men determined not to repeat their predecessors’ mistakes: “Munich” became a synonym for weakness, and leaders such as Winston Churchill made anti-appeasement the basis of their postwar policy of resisting Soviet expansionism. In 1946, Churchill summed up the worldview he had acquired from the Munich era in a famous speech delivered in Fulton, Missouri, in which he coined the term *iron curtain* to describe Soviet policy in Eastern Europe.

The events leading up to World War II were the formative experiences of those leaders who came to power in the 1940s, 1950s, and 1960s. What they took to be the lessons of Pearl Harbor and Munich were applied repeatedly: in building a network of defensive alliances in Europe and Asia during the late 1940s and 1950s, in operating an airlift to aid West Berlin when road access was cut off by the Russians, in coming to the aid of South Korea, and finally in intervening in Vietnam. Most of these applications of the containment worldview were successful in the sense that they did not harm American interests, they proved welcome to allies, or they prevented a military conquest.

The **disengagement** (or “Vietnam”) view resulted from the experience of the younger foreign policy elite that came to power in the 1970s. Unlike previous applications of the anti-appeasement view, our entry into Vietnam had led to a military defeat and a domestic political disaster. There were three ways of interpreting that crisis: (1) we applied the correct worldview in the right place but did not try hard enough; (2) we had the correct worldview but tried to apply it in the wrong place under the wrong circumstances; or (3) the worldview itself was wrong. By and large, the critics of our Vietnam policy tended toward the third conclusion, and thus when they supplanted in office the architects of our Vietnam

policy, they inclined toward a worldview based on the slogan “no more Vietnams.” Critics of this view called it the “new isolationism,” arguing that it would encourage Soviet expansion.

The debates over the Vietnam War colored many subsequent discussions of foreign policy. Almost every military initiative since then has been debated in terms of whether it would lead us into “another Vietnam”: sending the Marines to Lebanon, invading Grenada, dispatching military advisers to El Salvador, supporting the *contras* in Nicaragua, helping South American countries fight drug producers, and sending troops to invade Iraq.

How elites thought about Vietnam affected their foreign policy views for many years. If they thought the war was “immoral,” they were reluctant to see American military involvement elsewhere. These elites played a large role in the Carter administration, but were replaced by rival elites—those more inclined to a containment view—during the Reagan presidency.<sup>38</sup> When George H. W. Bush sought to expel Iraqi troops from Kuwait, the congressional debate pitted those committed to containment against those who believed in disengagement. Containment advocates narrowly carried the Senate vote on Bush’s request for permission to use troops.

When Clinton became president in 1992, he brought to office a lack of interest in foreign policy coupled with advisers who were drawn from the ranks of those who believed in disengagement. His strongest congressional supporters were those who had argued against the Gulf War. But then a remarkable change occurred. When Slobodan Milosevic, the Serbian leader, sent troops into neighboring Kosovo to suppress the ethnic Albanians living there, the strongest voices for American military intervention came from those who once advocated disengagement. During the Gulf War, 47 Senate Democrats voted to oppose U.S. participation. A few years later, 42 Senate Democrats voted to support our role in Kosovo.

What had happened? The change was inspired by the view that helping the Albanians was required by the doctrine of **human rights**. Liberal supporters of U.S. air attacks on Serbian forces believed that we were helping Albanians escape mass killing. By contrast, many conservative members of Congress who had followed a containment policy in the Gulf War now felt that disengagement ought to be followed in Kosovo. Of course, politics also mattered. Clinton was a Democratic president; Bush had been a Republican one.

**isolationism** The belief that the United States should withdraw from world affairs.

**containment** The belief that the United States should resist the expansion of aggressive nations, especially the former Soviet Union.

**disengagement** The belief that the United States was harmed by its war in Vietnam and so should avoid supposedly similar events.

**human rights** The belief that we should try to improve the lives of people in other countries.

But politics was not the whole story. Advocates of intervention declared that the attack in Kosovo resembled the genocide—that is, the mass murder of people because of their race or ethnicity—that the Jews had suffered in Nazi Germany. They held that we must “never again” permit a whole people to be killed. Anti-interventionists said if American foreign policy were guided by human rights, then the United States would have to send troops to many places. How would military action resolve a conflict that had gone on for centuries?

Policymakers wrestled with bringing together American principles and American interests, a challenge that became especially pressing after mass atrocities in ethnic conflicts around the globe in the 1990s. In Rwanda, a civil war between ethnic Hutus and Tutsis resulted in the deaths of 800,000 people in just a few months in 1994. The Canadian government subsequently convened an international commission in 2001 to develop guidelines for states to prevent such crimes against humanity in the future. The panel’s report, “Responsibility to Protect,” declared that state sovereignty includes an affirmative responsibility to protect citizens from large-scale human-rights violations, such as genocide or war crimes, and that states may take action (political or economic, with military force as a last resort) to ensure that other states uphold that responsibility. The United Nations adopted the “R2P” doctrine in 2005, though states differ sharply on where and how implementation is needed.<sup>39</sup>

## Political Polarization

For as long as we have records, public opinion has been slow to favor our military actions overseas in the abstract but quick to support them once they occur. However, that pattern ended with our invasion of Iraq in 2003. Public opinion became divided deeply about that war, with most Democrats opposing strongly it and most Republicans favoring it.<sup>40</sup>

That was not how things worked out during our wars in Korea and Vietnam. The war in Korea produced angry divisions in Congress, especially after General Douglas MacArthur, the allied commander in Korea, was fired in 1951 for having disobeyed the president. He received a hero’s welcome when he returned to this country and gave an emotional speech to a joint session of Congress. Many Republicans demanded that President Truman be impeached. Despite this public support for MacArthur and these angry congressional words, the country was not split along partisan lines. Slightly more Republicans than Democrats said the war was a mistake (roughly half of each party), but the differences between these voters was not great.

The war in Vietnam split American political elites even more deeply. Journalists and members of Congress took sharply opposing sides, and some Americans traveled to North Vietnam to express their support for the Communist cause. When the North Vietnamese launched a major offensive to destroy American and South Vietnamese troops during the Tet holidays in 1968, it failed; however, the American press reported it as a Communist victory, and demands to bring our troops home were heard during the presidential campaign that year. But public opinion did not divide along



## HOW WE COMPARE

### Public Attitudes on America in the World

With the ending of the Cold War, the United States became the world’s sole superpower, and it continues to be viewed as such in the 21st century. Both American and international public opinion show ambivalence about that role and U.S. responsibilities in the world in the twenty-first century.

A 2013 survey on “America’s Place in the World” found that a majority of Americans, for the first time in almost 40 years, said the United States was a less important and powerful leader than it was 10 years earlier. Fifty-three percent of people surveyed held this view, more than double the 20 percent result from 2004. The survey, sponsored by the Pew Research Center and the Council on Foreign Relations, also found that 70 percent of Americans viewed international respect for the United States as in decline, and that just over half of Americans thought the United States “should mind its own business internationally.”<sup>41</sup> One year later, with the rise of Islamic extremists in Iraq and Syria, and intervention by Russia in the Ukraine, the percentage of Americans who said the United States was less important and powerful than 10 years earlier had dropped to 48 percent. And the percentage of Americans saying the United States did too little to address global problems had increased from 17 percent in 2013 to 31 percent.

Globally, majorities in 30 of 43 nations surveyed held positive views of the United States in 2014. Favorable views of the United States were high in Africa, Europe, Asia, and Latin America, but much lower in the Middle East. Young people in other countries were more likely than older people to view the United States positively. People in other countries also were strongly opposed to U.S. electronic surveillance programs and use of drones to attack terrorists. In the United States, half of Americans said drone strikes had made the United States safer, but just 39 percent said the same about government surveillance programs, and 31 percent said the same about the war in Afghanistan.

**Sources:** Pew Research Center, “Public Sees U.S. Power Declining as Support for Global Engagement Slips,” December 3, 2013; Pew Research Center, “As New Dangers Loom, Most Think the U.S. Does ‘Too Little’ To Solve World Problems,” August 28, 2014; Susan Page, “Poll: Amid Foreign Crises, More Americans Support U.S. Action,” *USA Today*, August 28, 2014; Pew Research Center, “Global Opposition to U.S. Surveillance and Drones, But Limited Harm to America’s Image,” July 14, 2014; Pew Research Center, “Americans Divided on Whether Drones Make U.S. Safer,” December 3, 2013.

party lines; in 1968, Democratic and Republican voters had just about the same views (a little over half thought the war was a mistake, about a third thought it wasn’t).

Our invasion of Iraq was a different story. From the very first, Democratic voters opposed it strongly and Republican

voters favored it. By 2006, 76 percent of Democrats said we should have stayed out of Iraq, while 71 percent of Republicans said that the invasion was the right thing to do.<sup>42</sup>

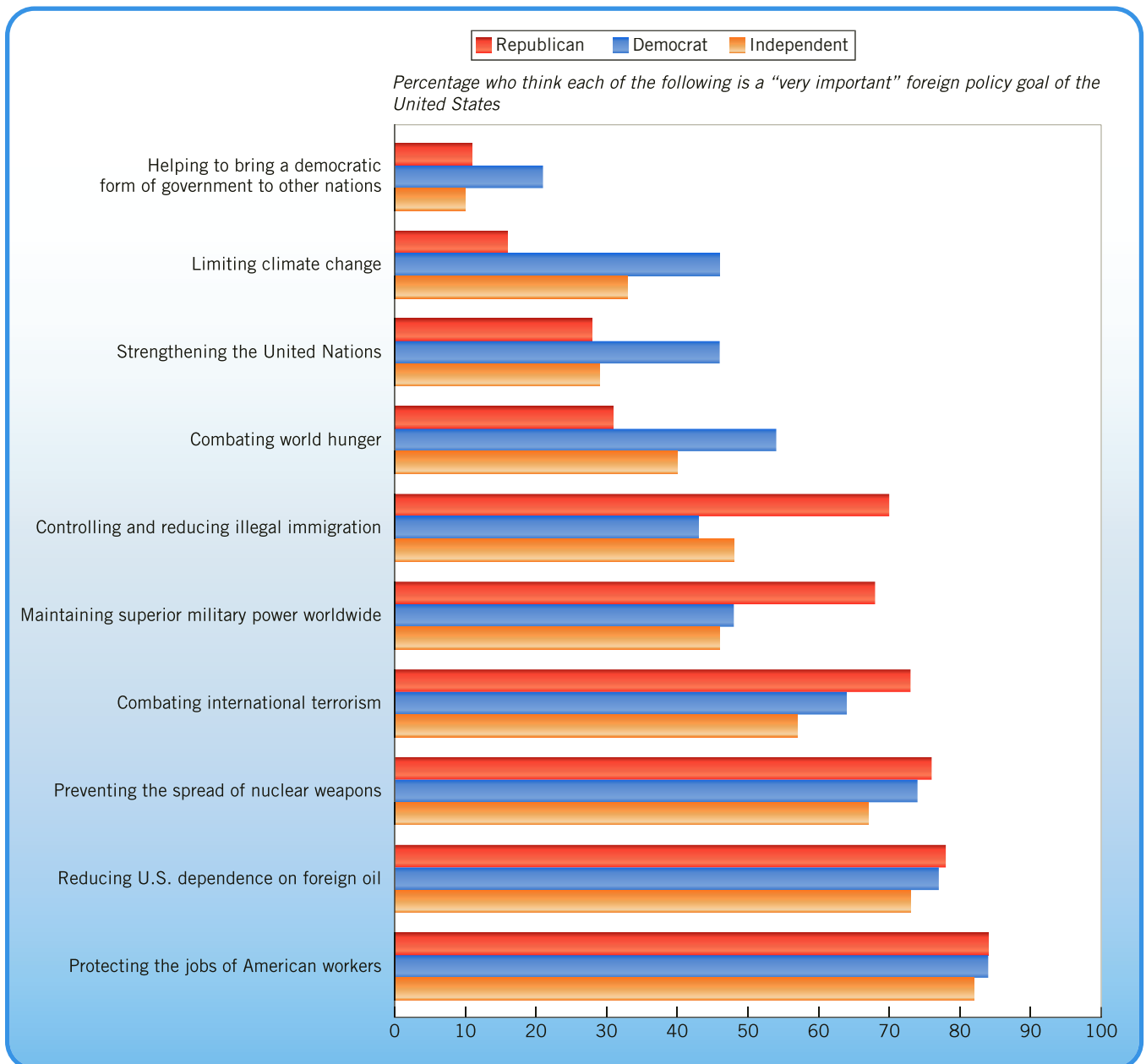
American public opinion has become more polarized by our foreign policy. **Polarization** means a deep and wide conflict, usually along party lines, over some government policy (recall our discussion in Chapter 6). It has replaced the bipartisan foreign policy of World War II and the modest differences in public opinion during Korea and Vietnam.<sup>43</sup>

It is clear from Figure 14-3 that what political party we belong to is strongly linked to our views on foreign policy. The public is divided deeply about these matters, and so, we think, will be the people for whom they vote.

**polarization** A deep and wide conflict over some government policy.

But, we would emphasize that this does not mean the American public has deeply divided views about foreign policy aims. All Americans—Democrats and Republicans alike—want

**FIGURE 14-3** Foreign Policy Goals



**Source:** Chicago Council on Global Affairs, "Foreign Policy in the New Millennium: Results of the 2012 Chicago Council Survey of American Public Opinion and U.S. Foreign Policy," Table 5.2, "Foreign Policy Goals," p. 43.



**military-industrial complex** An alleged alliance between military leaders and corporate leaders.

**bipolar world** A political landscape with two superpowers.

**unipolar world** A political landscape with one superpower.

peace, prosperity, and security, and they support troops that are deployed.<sup>44</sup> Americans tend to divide along party lines on conflicts like Iraq when elites divide along party lines. As we saw in Chapter 6, ordinary voters take their cues from elites from their political party, and divisions on foreign policy reflect divisions among Congressional elites. While elites were divided on Vietnam, that division existed within both parties in Congress, and so public opinion was less polarized by party during those conflicts.<sup>45</sup> Whether the public is divided along party lines in future conflicts depends a great deal on how elites divide on those conflicts.

## 14-4 The Politics of Foreign Affairs: Military Action, Defense Policy, and the Future

There are two views about the role of the military in American life. One is majoritarian: the military exists to defend the country or to help other nations defend themselves. When troops are used, almost all Americans benefit and almost all pay the bill. (Some Americans, such as those who lose a loved one in war, pay much more than the rest of us.) The president is the commander-in-chief, and Congress plays a largely supportive role.

Although the other view does not deny that the armed forces are useful, it focuses on the extent to which the military is a large and powerful client. The real beneficiaries of military spending are the generals and admirals, as well as the big corporations and members of Congress whose districts get fat defense contracts. Everyone pays, but these clients get most of the benefits. What we spend on defense is shaped by the **military-industrial complex**, a supposedly unified bloc of Defense Department leaders and military manufacturers. From this perspective, there are two key issues in national defense: how much money we spend and how it is divided up. The first reflects majoritarian politics, the second, interest-group bargaining.

### Military Action

Foreign policy takes many forms—discussions are held, treaties are signed, organizations are joined—but in many cases it depends on the ability to use military force. Troops, ships, and aircraft are not the only ways of influencing other countries; international trade and foreign aid are also useful. But in modern times, as in the past, the nations of the world know the difference between a “great power” (i.e., a heavily armed one) and a weak nation.

During the Cold War, distinctions between nations were relatively easy. For a half century, each American president, operating through the National Security Council, made it

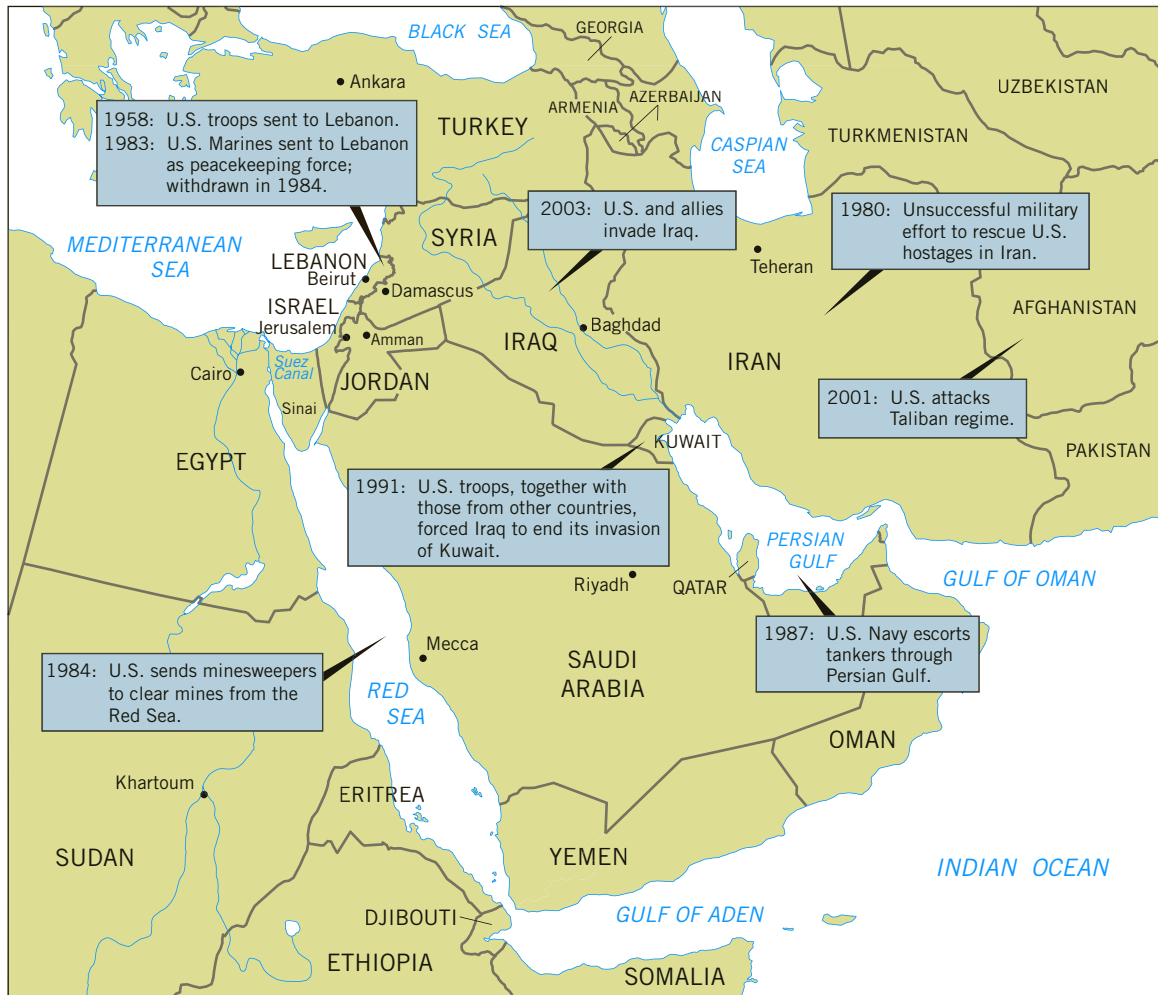
clear that our chief goal was to prevent the Soviet Union from overrunning Western Europe, bombing the United States, or invading other nations. But since the Soviet Union has disappeared, no other nation has acquired the power to take its place. During the Cold War, we lived in a **bipolar world** made up of two superpowers. Now we live in a **unipolar world** made up of the United States as the only superpower.

With the collapse of the Soviet Union and the end of the Cold War, one might think that military power would become less important. But in fact it remains as important as ever. Since the Soviet Union was dissolved and the Berlin Wall came down in 1989, the United States has used military force to attack Iraq, maintain order in Bosnia, defend Kosovo, and go to war in Afghanistan. Various rogue nations, such as Iran and North Korea, have acquired or are about to acquire long-range rockets and weapons of mass destruction (WMD), such as nuclear, chemical, and biological arms. Many nations that feel threatened by their neighbors, such as China, India, Pakistan, and Israel, have nuclear bombs. And Russia still has many of the nuclear weapons that the old Soviet Union built. As the events of the 1990s and early 21st century make clear, by no means has the end of the Cold War meant the end of war.

### The Post-Cold War Era and the Persian Gulf War

Although the Soviet Union did not dissolve formally until the end of 1991, the ending of the Cold War became clear when the two superpowers worked together to resolve an international conflict. In the summer of 1990, the Iraqi army under Saddam Hussein invaded neighboring Kuwait. Calling for Iraq to withdraw, President George H. W. Bush declared that nations uniting to oppose the invasion were creating a “new world order. . . . A world where the rule of law supplants the rule of the jungle. . . . A world where the strong respect the rights of the weak.”<sup>46</sup> The United Nations Security Council subsequently passed a resolution demanding that Iraq withdraw and authorizing force to expel it. In January 1991, the United States led a coalition of forces from several nations that attacked Iraq; within 100 days, the Iraqi army had retreated from Kuwait and fled home. The U.S.-led military forces ended their attack, allowing Saddam to remain in power in Baghdad, the Iraqi capital.

After the war, a no-fly zone was established under which Iraqi flights in certain areas were prohibited. This ban was enforced for 12 years by U.S., British, and French planes that shot down Iraqi aircraft violating the rule. Throughout this time, United Nations (UN) inspectors were sent to Iraq to look for weapons of mass destruction (WMDs): chemical, biological, and nuclear materials that could be used to attack others. There was no doubt Iraq could produce such weapons, as Saddam had dropped chemical weapons on people living in his own country. The UN inspectors found evidence of such a program, but in 1997 Saddam expelled them from his country, only to allow them to return a few years later. Many U.S. political leaders began to conclude that the Iraq regime was a threat to peace. In 1998, President Bill Clinton signed the Iraq Liberation Act, which called for new leadership in Iraq. How this change would be achieved, however, was unclear.

**MAP 14-1 U.S. Military Intervention in the Middle East**

## Combating Terrorism After 9/11

After the 9/11 terrorist attacks, U.S. foreign and military policy have focused on how to combat the perpetrators of terrorism and what to do with nations we have conquered that harbored terrorists. President George W. Bush in September 2002 issued a document that emphasized a new view of our policies. Instead of waiting to be attacked, the president said America “will act against such emerging threats before they are fully formed” because we “cannot defend America and our friends by hoping for the best.” We will identify and destroy a terrorist threat “before it reaches our borders” and “we will not hesitate to act alone.”<sup>47</sup> In the case of Iraq, this meant a commitment to “regime change”—that is, getting rid of a hostile government, even if the United Nations did not support us.

This has been called a doctrine of preemption;—of attacking a determined enemy before it can launch an attack against us or an ally. In fact, it is not really new. President Bill Clinton launched cruise missile strikes against training camps used by Osama bin Laden’s followers in the aftermath of their bombing of American embassies in Kenya and Tanzania in 1998. President George W. Bush elevated the policy of preemption into a clearly stated national doctrine.

## Afghanistan and Iraq

The United States did not employ preemption in Afghanistan in 2001, as Congress’s September 18 joint resolution authorized the use of military force against the perpetrators of the 9/11 terrorist attacks as well as nations that had aided or harbored them.<sup>48</sup> The United States and Great Britain commenced air strikes in Afghanistan in October 2001 and quickly forced the Taliban from power. The escape of terrorist leader Osama bin Laden, though, became a major point of contention for critics of the war. U.S. troops remained in Afghanistan, and in 2003, NATO sent peacekeeping forces to the country.<sup>49</sup>

Congress also passed a joint resolution in October 2002 authorizing the use of force in Iraq if Saddam Hussein did not comply with weapons inspections. The following month, the United Nations Security Council unanimously passed a resolution that gave Iraq one final opportunity to provide a full accounting of its WMD programs, or face “serious consequences.” But when Iraq did not comply, the Security Council lacked consensus on whether the November 2002 resolution authorized military force; and U.S. efforts to secure another resolution explicitly granting that authorization were unsuccessful.<sup>50</sup>

Unable to convince the United Nations to support a war, the United States, Great Britain, and other countries decided to act alone. On March 30, 2003, they invaded Iraq in a campaign called Operation Iraqi Freedom; within about six weeks, the Iraqi army was defeated and the American-led coalition occupied all of the country. After the war, a large group of inspectors toured Iraq looking for WMDs, but they found virtually none. Later, a bipartisan commission concluded that Saddam had apparently cancelled his WMD program, but had told few of his own military leaders about this.<sup>51</sup>

The newly freed Iraqi people voted first for an interim parliament, then for a new constitution, and finally for a regular government. But this process was offset by the terrorist activities of various insurgents, first aimed at American troops and later at Iraqi civilians, killing several tens of thousands of them. The situation in Iraq became a major American political issue, contributing to the loss of the Republican congressional majority in the 2006 elections.

After conquering Afghanistan and Iraq, the United States faced the problem of rebuilding these nations. The United States has had a lot of experience, some good and some bad, with this problem. We helped put Germany and Japan back on their feet after World War II. From 1992 to 1994, we tried to bring peace among warring factions to Somalia. From 1994 to 1996, we worked to install a democratically elected president and rebuild the local police force in the Caribbean country of Haiti. Starting in 1995, we worked with European allies to restore order to Bosnia and Kosovo, located in what used to be Yugoslavia. In 2001, we began helping Afghans create a new government and economy, and in 2003 we started doing the same in Iraq. We succeeded in Germany and Japan, failed in Somalia and Haiti, and made progress in Bosnia and Kosovo.<sup>52</sup>

After defeating the Iraqi army easily in 2003, we tried to bring stability and democracy to the country in mistaken ways. We abolished the Iraqi army (and so had no native defense force), relied on too few American troops (and so could not pacify the country), and kept these troops when they were not fighting in American compounds (thus leaving Iraqi civilians unprotected). Iran funneled arms and terrorists into the country to help attack American soldiers. Public opinion in this country, though deeply divided along party lines, became hostile to our efforts there.

To deal with this problem, President Bush announced a new strategy in January 2007, over the objections of many subordinates. We would send another 30,000 troops to Iraq (the “surge”) and instruct these troops to work in Iraqi neighborhoods and build alliances with local groups. He assigned General David Petraeus to be the military leader.

In subsequent months, deaths of American forces and Iraqi civilians fell dramatically, an elected Iraqi government began to function effectively, and new Iraqi elections in 2009 were held peacefully. The American government negotiated an agreement with Iraqi leaders that called for withdrawing most American troops from the country by 2011. Many people attributed this success to the surge, while others credited the Sunni uprising in opposition to al-Qaeda in Iraq that led to the “Anbar Awakening.”<sup>53</sup> Because of this progress and

because our economy went into a recession, American public opinion began to lose interest in Iraq.

Afghanistan is a more difficult problem. Unlike Iraq, it has never been a unified nation and lacks a large middle class or many populous cities. We defeated the Taliban regime easily and managed to put in office a moderate leader. Troops from other nations arrived to help out. But creating an effective central government in a country that has rarely had one and ending terrorist attacks have proved to be difficult assignments. During the 2008 presidential campaign, Barack Obama promised to send more forces to that country, and beginning in 2009 he did so. By the middle of the year we had 60,000 troops there, but they were not enough.

In 2009, the general leading U.S. forces in Afghanistan asked President Obama for another 40,000 troops; the president sent 30,000. In 2011, the Obama administration began to draw down its “surge” in Afghanistan, with fewer than 10,000 troops there in 2015, and plans to withdraw all U.S. forces by the end of the president’s second term.<sup>54</sup> But the prospects for long-term stability in the country and region remained uncertain.

## Building Support for U.S. Military Action

Supporters of Bush’s preemption strategy hailed it as a positive step to defeat terrorists abroad before they could attack us at home. Critics attacked the argument as justifying preemptive and possibly unjust wars, and abandoning the United Nations. This debate has divided Congress in a way that puts an end to the old adage that partisanship ends at the water’s edge.

Since the end of the Cold War, we have not had a common enemy that, in the opinion of critics of our overseas efforts, should justify a nonpartisan view. As noted earlier (see pp. 292–93), most liberal Democrats opposed both our effort to get Iraq out of Kuwait in 1991 and our invasion of Iraq in 2003; most Republicans supported both efforts.<sup>55</sup> But when President Clinton launched attacks on hostile forces in Kosovo, he was supported by many liberal Democrats and opposed by many conservative Republicans.<sup>56</sup> Party differences and political ideology now make a big difference in foreign policy.

In the 20th century, the United States sometimes sought and obtained United Nations support, as with going to war in Korea (1950) and in launching the military effort to force Iraqi troops out of Kuwait (1991). The United States did not have UN authorization to fight against North Vietnam (in the 1960s), occupy Haiti (1994), or assist friendly forces in Bosnia (1994) or Kosovo (1999). In the aftermath of 9/11, policymakers are divided over whether the United States should “go it alone” against its enemies abroad, or do so only on the basis of a broad coalition of supporting nations. The first President Bush assembled just such a coalition to force Iraq out of Kuwait, but the second President Bush acted without UN support in invading Afghanistan and later Iraq, though he received crucial support from the United Kingdom, Australia, and Poland.

The Obama administration has had many disputes with Congress in foreign affairs. In 2012, Obama said use of chemical weapons by Syria would cross a “red line” that could prompt military intervention, but when Syria gassed its own people one year later, the president said he would act only with legislative authorization, which Congress did not grant.<sup>57</sup> (The United States and Russia ultimately negotiated a deal with Syria to destroy its chemical weapons.)

In the summer of 2014, Obama approved air strikes against Islamic militants in the Middle East (known as ISIS—the Islamic State of Iraq and Syria—or ISIL—the Islamic State of Iraq and the Levant) without congressional approval. He did request a resolution afterward authorizing the use of force, saying it was not necessary for him to act, but would demonstrate American unity.<sup>58</sup> The Obama administration also pursued discussions with Iran to end its nuclear program, but in the face of strong legislative opposition, the president agreed in the spring of 2015 that Congress would have a formal say in any accord.<sup>59</sup>

When the administration announced an agreement a few months later, many legislators—primarily Republicans, but also some Democrats—declared that the deal would endanger U.S. national security.<sup>60</sup> In September 2015, Senate Republicans were unable to overcome a Democratic filibuster and reject the agreement, though the Republican-led House did vote against the nuclear deal, with some Democratic support.<sup>61</sup> Consequently, the agreement went into effect without any Republican backing.<sup>62</sup> These strong public conflicts between the executive and legislative branches in the 21st century make clear that the Cold War consensus in foreign affairs (though certainly not as cohesive as sometimes suggested) no longer guides decisionmaking.

## Defense Policy

Throughout most of our history, the United States has not maintained large military forces during peacetime. For instance, the percentage of the gross national product (GNP) spent on defense in 1935, on the eve of World War II, was

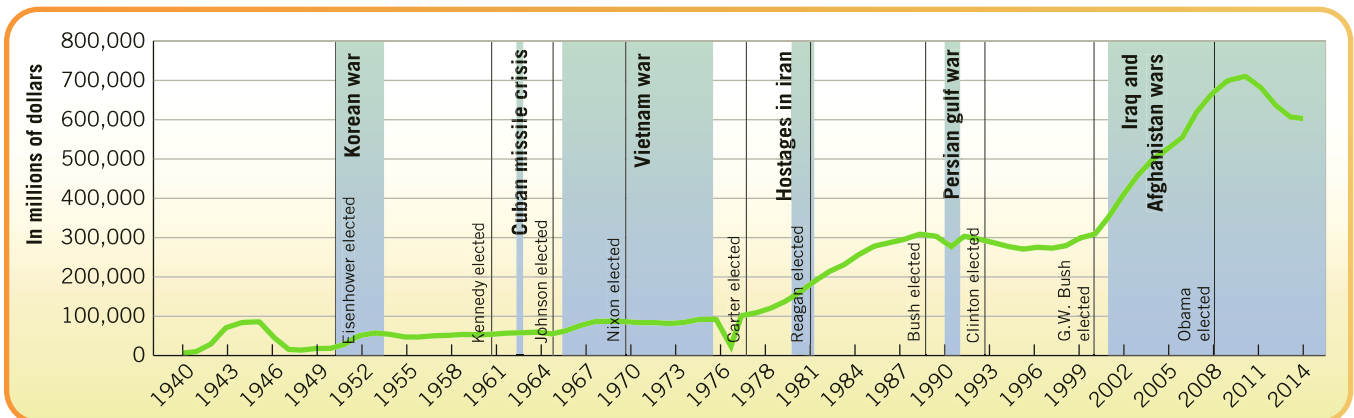
about the same as it was in 1870, on the eve of nothing in particular. We armed when a war broke out, then we disarmed when the war ended.

But all of that changed after World War II, when defense spending declined sharply but did not return to its prewar levels. And in 1950, our defense expenditures soared again. In that year, we rearmed to fight a war in Korea, but when it was over, we did not disarm completely. The reason was our containment policy toward the Soviet Union. For about 40 years—from the outbreak of the Korean War in 1950 to the collapse of the Soviet Union in 1991—American military spending was driven by our desire to contain the Soviet Union and its allies. The Soviet Union had brought under its control most of Eastern Europe; would it also invade Western Europe? Russia had always wanted access to the oil and warm-water ports of the Middle East; would the Soviets someday invade or subvert Iran or Turkey? The Soviet Union was willing to help North Korea invade South Korea and North Vietnam to invade South Vietnam; would it next use an ally to threaten the United States? Soviet leaders supported “wars of national liberation” in Africa and Latin America; would they succeed in turning more and more nations against the United States?

To meet these threats, the United States built up a military system designed to repel a Soviet invasion of Western Europe and at the same time help allies resist smaller-scale invasions or domestic uprisings. Figure 14-4 shows U.S. military spending from World War II to the present. It illustrates that even after we decided to keep a large military force after World War II, there have been many ups and downs in the actual level of spending. After the Korean War was over, we spent less; when we became involved in Vietnam, we spent more; when the Soviet Union invaded Afghanistan and we invaded Iraq, we spent more again. These changes in spending tended to reflect changes in public opinion about the defense budget.

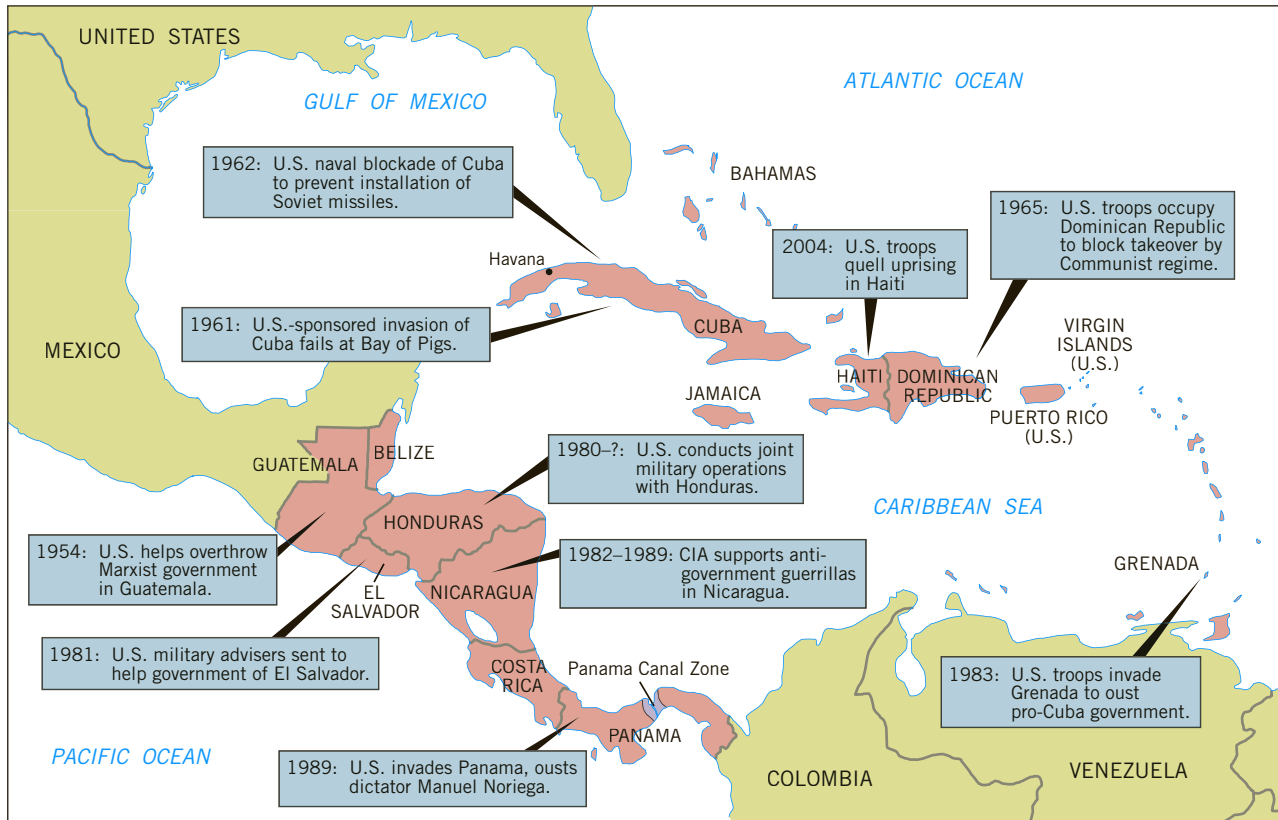
As Figure 14-5 shows, a majority of Americans have said that our defense program is either “about right” or “not strong enough,” but other studies show that popular support for spending more money on defense changes from year to year.

**FIGURE 14-4** Trends in Military Spending



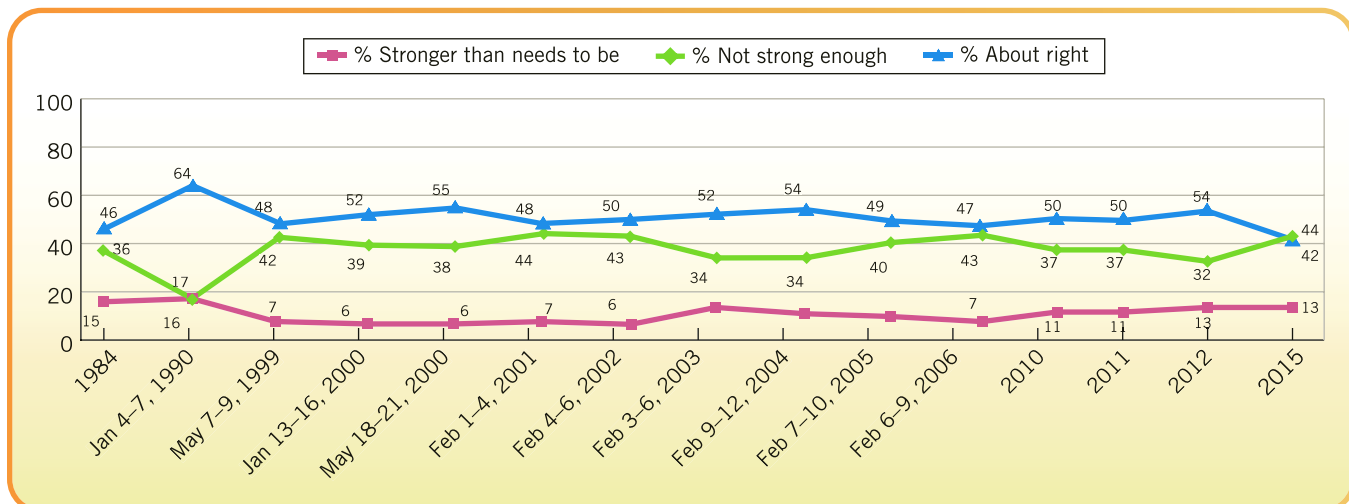
**Source:** The White House, Office of Management and Budget, *Historical Tables*, Table 3.1—Outlays by Super function and Function, 1945–2020.



**MAP14-2 U.S. Military Intervention in Central America and the Caribbean since 1950**

The collapse of the Soviet Union ushered in a major debate about U.S. defense strategy. Liberals demanded sharp cuts in defense spending, weapons procurement, and military personnel, arguing that with the Soviet threat ended, it was time to collect our “peace dividend” and divert funds from the military to domestic social programs. Conservatives agreed that some military cuts were in order, but they argued

that the world was still a dangerous place and therefore that a strong (and well-funded) military remained essential to the nation’s defense. This disagreement reflected different predictions about what the future would be like. Many liberals (and some conservatives—such as Pat Buchanan, who believed that America should “stay at home”) argued that we could not afford to be the “world’s policeman.” Many conservatives

**FIGURE 14-5 Most Americans think National Defense is Either “About Right” or “Not Strong Enough”**

**Source:** Justin McCarthy, “Americans Split on Defense Spending,” *Gallup, Inc.*, February 20, 2015.

(and some liberals) responded by saying that Russia was still a military powerhouse that might once again fall under the control of ruthless leaders and that many other nations hostile to the United States—such as North Korea, Iran, and Iraq—were becoming potential adversaries as they tried to build or acquire nuclear weapons and missile systems.

American campaigns in Afghanistan and Iraq made clear that whether or not the United States was the “world’s police officer,” there was no escaping its need to use military force. They also made clear that the United States had reduced its armed forces so sharply since Desert Storm (there were half a million fewer people in the military in 1996 than in 1991) that it was hard-pressed to carry out any sustained military campaign (see Table 14-1). When the national budget deficit was eliminated in 1999, both President Clinton and the Republican Congress called for more military spending.

But that increase did not pay for what the military had been authorized to buy, and did little to get us ready for the war in Afghanistan against Osama bin Laden. Once the battle began, however, the federal purse strings loosened and the defense budget grew.

What do we get with our money? We get people, of course—soldiers, sailors, airmen, and airwomen. They are the most expensive part of the defense budget. Then we get hardware of roughly two kinds: big-ticket items, like aircraft carriers and bombers, and small-ticket items, like hammers and screwdrivers. Each of these kinds of hardware has its own politics. Finally, we get “readiness”: training, supplies, munitions, fuel, and food.

**TABLE 14-1 U.S. Military Forces Before and After the Breakup of the Soviet Union**

Service	Before 1991	End FY 1998
<b>Army</b>		
Active divisions	18	10
National Guard divisions	10	8
<b>Navy</b>		
Aircraft carriers	15	11
Training carriers	1	2
Ships	546	346
<b>Air Force</b>		
Active fighter wings	24	13
Reserve fighter wings	12	7
<b>Marine corps</b>		
Active divisions	3	3
Reserve divisions	1	1
<b>strategic Nuclear Forces</b>		
Ballistic missile submarines	31	18
Strategic bombers	324	182
ICBMs	1,000	550

**Source:** Statistical Abstract of the United States, 1998, 363.

## Personnel

Efforts to develop our military forces before World War II reflected Americans’ considerable discomfort with a strong central government. The United States did not institute a peacetime draft until 1940, when the rest of the world was already at war, and the draft was renewed the following year (only a few months before Pearl Harbor) by only a one-vote margin in the House. Until 1973, the United States relied on the draft to obtain military personnel. Then, at the end of the Vietnam War, it replaced the draft with the all-volunteer force (AVF). After getting off to a rocky start, the AVF began to improve thanks to increases in military pay and rising civilian unemployment. Abolishing the draft had been politically popular; nobody likes being drafted, and even in congressional districts that otherwise are staunch supporters of a strong defense, voters tell their representatives that they do not want to return to the draft (and many military leaders agree).

There has been a steady increase in the percentage of women in the military; in 2011, they constituted 14.5 percent of the total. For a long time, however, women were barred by law from serving in combat roles. (What constitutes a “combat role” is a bit difficult to say, since even personnel far from the main fighting can be hit by an enemy bomb or artillery shell.) In 1993 Congress ended the legal ban on assigning women to navy combat ships and air force fighter jets, and soon women were serving on three aircraft carriers. Twenty years later, the Pentagon lifted its official ban on women serving in combat.

The military’s rules on sexual orientation and military service also have changed significantly in the past two decades. Until 1993, it was the long-standing policy of the U.S. armed forces to bar gay and lesbian soldiers from entering the military and to discharge them if they were discovered when serving. Gay and lesbian rights organizations had long protested this exclusion. In 1993, a gay soldier won a lawsuit against the army for having discharged him; he settled for back pay and retirement benefits in exchange for a promise not to re-enlist. In 1993, a judge ordered the navy to reinstate a discharged sailor who had revealed on national television that he was gay.

In 1992, presidential candidate Bill Clinton had promised to lift the official ban on gays and lesbians serving in the military if he were elected to office. Once in office, he discovered that it was not that easy. Many members of the armed forces believed that knowingly serving alongside and living in close quarters with gays and lesbians would create unnecessary tension and harm military morale and troop solidarity. The Joint Chiefs of Staff opposed lifting the ban, and several key members of Congress said they would try to pass a law reaffirming it. President Clinton was forced to settle for a compromise: “Don’t ask, don’t tell.” Under this policy, persons entering or serving in the military would not be asked to reveal their sexual orientation and would be allowed to serve, provided they did not engage in homosexual conduct. If a person stated that he or she was gay, that would not have been automatic grounds for discharge, but it may have been grounds for launching an investigation to determine whether rules against homosexual conduct had been violated.

In 1994, the new Pentagon rules designed to implement “don’t ask, don’t tell” went into effect, but the challenges of

**cost overruns** When the money actually paid to military suppliers exceeds the estimated costs.

**gold plating** The tendency of Pentagon officials to ask weapons contractors to meet excessively high requirements.

implementation soon prompted calls for ending altogether the prohibition on soldiers revealing their sexual orientation. President Obama signed a law repealing “don’t ask, don’t tell” in 2010 with the strong support of his secretary of defense and chairman of the Joint Chiefs, who said this would not harm military readiness.

### Big-Ticket Items

Whenever the Pentagon buys a new submarine, airplane, or missile, we hear about **cost overruns**. In the 1950s, actual costs were three times greater than estimated costs; by the 1960s, things were only slightly better—actual costs were twice estimated costs.

There are five main reasons for these overruns. First, it is hard to know in advance what something that has never existed before will cost once you build it. People who have remodeled their homes know this all too well. So do government officials who build new subways or congressional office buildings. It is no different with a B-2 bomber.

Second, people who want to persuade Congress to appropriate money for a new airplane or submarine have an incentive to underestimate the cost. To get the weapon approved, its sponsors tell Congress how little it will cost; once the weapon is under construction, the sponsors go back to Congress for additional money to cover “unexpected” cost increases.

Third, the Pentagon officials who decide what kind of new aircraft they want are drawn from the ranks of those who will fly it. These officers naturally want the best airplane (or ship or tank) that money can buy. As air force General Carl “Tooe” Spaatz once put it, “A second-best aircraft is like a second-best poker hand. No damn good.”<sup>63</sup> But what exactly is the “best” airplane? Is it the fastest one? Or the most maneuverable one? Or the most reliable one? Or the one with the longest range? Pentagon officials have a tendency to answer, “All of the above.” Of course, trying to produce all of the above is incredibly expensive (and sometimes impossible). But asking for the expensive (or the impossible) is understandable, given that the air force officers who buy it will also fly it. This tendency to ask for everything at once is called **gold plating**.

Fourth, many new weapons are purchased from a single contractor. This is called sole-sourcing. A contractor is hired to design, develop, and build an airplane. As a result there is no competition, and so the manufacturer has no strong incentive to control costs. And if the sole manufacturer gets into financial trouble, the government, seeking to avoid a shutdown of all production, has an incentive to bail the company out.

Fifth, when Congress wants to cut the military budget, it often does so not by canceling a new weapons system but by stretching out the number of years during which it is purchased. Say that Congress wants to buy 100 F-22s, 25 a year for four years. To give the appearance of cutting the budget, it will decide to buy only 15 the first year and take

five years to buy the rest. Or it will authorize the construction of 20 now and then ask again next year for the authority to build more. But start-and-stop production decisions and stretching out production over more years drives up the cost of building each unit. If Toyota built cars this way, it would go broke.

There are ways to cope with four of these five problems. You cannot do much about the first, ignorance; but you can do something about low estimates, gold plating, sole-sourcing, and stretch-outs. If the Pentagon would give realistic cost estimates initially (perhaps verified by another agency); if it would ask for weapons that meet a few critical performance requirements instead of every requirement that can be thought of; if two or more manufacturers were to compete in designing, developing, and manufacturing new weapons; and if Congress were to stop trying to “cut” the budget using the smoke-and-mirrors technique of stretch-outs, then we would hear a lot less about cost overruns.

Some of these things are being done. There is more competition and less sole-sourcing in weapons procurement today than once was the case. But the political incentives to avoid other changes are very powerful. Pentagon officers will always want “the best.” They will always have an incentive to understate costs. Congress will always be tempted to use stretch-outs as a way of avoiding hard budget choices.

### Readiness

Presumably, we have a peacetime military so that we will be ready for wartime. Presumably, therefore, the peacetime forces will devote a lot of their time and money to improving their readiness.



Vanderberg Air Force Base

**IMAGE 14-4** The United States has tried to decide whether to build interceptors like this one to shoot down incoming missiles from enemies.





ADEK BERRY/AFP/Getty Images

**IMAGE 14-5** A U.S. Marine goes on patrol in Afghanistan.

Not necessarily. The politics of defense spending is such that readiness often is given a very low priority. Here is why.

Client politics influences the decision. In 1990, Congress was willing to cut almost anything, provided it wasn't built or stationed in some member's district. That doesn't leave much. Plans to stop producing F-14 fighters for the navy were opposed by members from Long Island, where the Grumman manufacturing plant was located. Plans to kill the Osprey

aircraft for the Marines were opposed by members from the places where it was to be built. Plans to close bases were opposed by every member with a base in his or her district.

That leaves training and readiness. These things, essential to military effectiveness, have no constituencies and hence few congressional defenders. When forced to choose, the services themselves often prefer to allocate scarce dollars to developing and buying new weapons than to spending for readiness. Moreover, the savings from buying less fuel or having fewer exercises shows up right away, while the savings from canceling an aircraft carrier may not show up for years. Not surprisingly, training and readiness are usually what get the ax.

## Bases

At one time, the opening and closing of military bases was pure client politics, which meant that a lot of bases were opened and hardly any were closed. Almost every member of Congress fought to get a base in his or her district, and every member fought to keep an existing base open. Even the biggest congressional critics of the U.S. military, people who would vote to take a gun out of a soldier's hand, would fight hard to keep bases in their districts open and operating.

In 1988, Congress finally concluded that no base would ever be closed unless the system for making decisions was changed. It created a Commission on Base Realignment and Closure (BRAC), consisting of 12 private citizens (later reduced to eight) who would consider recommendations from the secretary of defense. By law Congress would have to vote within 45 days for or against the commission's list as a whole, without having a chance to amend it. Since 1988, there have been five BRAC reports. Congress approved each one, resulting in the closing of more than 350 bases.

Congress, it appears, has finally figured out how to make some decisions that most members know are right, but that each member individually finds it politically necessary to oppose.

## The Structure of Defense Decision Making

The formal structure within which decisions about national defense are made was in large part created after World War II, but it reflects concerns that go back at least to the time of the Founding. Chief among these is the persistent desire by citizens to ensure civilian control over the military.

The National Security Act of 1947 and its subsequent amendments created the Department of Defense. It is headed by the secretary of defense, under whom serve the secretaries of the army, the air force, and the navy as well as the Joint Chiefs of Staff. The secretary of defense, who must be a civilian (though one former general, George C. Marshall, was allowed by Congress to be the secretary), exercises command authority on behalf of the president over the defense establishment. The secretary of the army, the secretary of the navy,\* and the secretary of the air force also



Paul Chinai/San Francisco Chronicle/Corbis News/Corbis

**IMAGE 14-6** Retired Navy commander Zoe Dunning (second from left) and her friends celebrate the end of "Don't Ask, Don't Tell" in San Francisco.

\*The secretary of the Navy manages two services, the navy and the Marine Corps.



are civilians and are subordinate to the secretary of defense. Unlike their boss, they do not attend cabinet meetings or sit on the National Security Council. In essence, they manage the “housekeeping” functions of the various armed services, under the general direction of the secretary of defense and deputy and assistant secretaries of defense.

The four armed services are separate entities; by law, they cannot be merged or commanded by a single military officer, and each has the right to communicate directly with Congress. There are two reasons for having separate uniformed services functioning within a single department: the fear of many citizens that a unified military force might become too powerful politically, and the desire of each service to preserve its traditional independence and autonomy. The result, of course, is a good deal of interservice rivalry and bickering, but this is precisely what Congress intended when it created the Department of Defense. Rivalry and bickering, it was felt, would ensure that Congress would receive the maximum amount of information about military affairs and would enjoy the largest opportunity to affect military decisions.

Since the end of World War II, Congress has aimed to both retain a significant measure of control over the military’s decision making and ensure the adequacy of the nation’s defenses. Congress does not want a single military command headed by an all-powerful general or admiral, but neither does it want the services to be so autonomous, or their heads so equal, that coordination and efficiency suffer. In 1986, Congress passed and the president signed a defense reorganization plan known as the Goldwater-Nichols Act, which increased the power of the officers who coordinate the activities of the different services. The 1947 structure was left in place, but with revised procedures.

### Joint Chiefs of Staff

The Joint Chiefs of Staff (JCS) is a committee consisting of the uniformed heads of each of the military services (the army, navy, air force, and Marine Corps), plus a chairman and a nonvoting vice chairman, also military officers, who are appointed by the president and confirmed by the Senate. The JCS does not have command authority over troops, but it plays a key role in national defense planning. Since 1986, the chairman of the joint chiefs has been designated the president’s principal military adviser, in an effort to foster more influence over the JCS.

Assisting the JCS is the Joint Staff, consisting of several hundred officers from each of the four services. The staff draws up plans for various military contingencies. Before 1986, each staff member was loyal to the service whose uniform he or she wore. As a result, the staff was often “joint” in name only, since few members were willing to take a position opposed by their service for fear of being passed over for promotion. The 1986 law changed this in two ways. First, it gave the chairman of the JCS control over the Joint Staff; now it works for the chairman, not for the JCS as a group.

Second, it required the secretary of defense to establish guidelines to ensure that officers assigned to the Joint Staff (or to other interservice bodies) are promoted at the same rate as officers whose careers are spent entirely with their own services.

### The Services

Each military service is headed by a civilian secretary—one each for the army, the navy (including the Marine Corps), and the air force—plus a senior military officer: the chief of staff of the army, the chief of naval operations, the commandant of the Marine Corps, and the chief of staff of the air force. The civilian secretaries are in charge of purchasing, auditing, congressional relations, and public affairs. The military chiefs oversee the discipline and training of their uniformed forces and in addition represent their services on the Joint Chiefs of Staff.

### The Chain of Command

Under the Constitution the president is the commander-in-chief of the armed forces. The chain of command runs from the president to the secretary of defense (also a civilian), and then to the various unified and specified commands. These orders may be transmitted through the Joint Chiefs of Staff or its chairman, but by law the chairman of the JCS does not have command authority over the combat forces. Civilians are in charge at the top to protect against excessive concentration of power.

Analysts debate the effects of the 1986 changes, though many viewed the quick victory in the 1991 Persian Gulf War as evidence of their success. Critics of the Pentagon have been urging changes along these lines at least since 1947. But others say that unless the armed services are actually merged, interservice rivalry will continue. Still others argue that even the coordination achieved by the 1986 act is excessive. The country, in their view, is better served by wholly autonomous services. What is striking is that so many members of Congress who once would have insisted on the antcoordination view voted for the 1986 law, indicating a greater willingness to permit some degree of central military leadership.

## The Future of American Foreign Policy

In the 21st century, American foreign policy continues to be dominated by broad questions about the U.S. role in the world, as well as more specific debates about defense programs, spending, and decision making. Politically, the president leads foreign policy making, but the Constitution divides power between Congress and the president; and in recent years, some members of Congress have become more assertive in criticizing executive actions abroad. As the United States determines how it will engage with other nations, and where it will seek to exercise influence abroad, executive-legislative cooperation—with some guidance from public opinion—will be essential for pursuing American goals and interests.

## LEARNING OBJECTIVES .....

### 14-1 Summarize the different types of politics involved in American foreign policy.

American foreign policy typically involves majoritarian, interest-group, or client politics. Decisions about going to war largely raise questions about majoritarian politics; trade and defense spending issues often incorporate interest-group politics; and foreign-aid debates usually bring in client politics.

### 14-2 Discuss the constitutional and legal context for making American foreign policy.

The Constitution states that the president is commander-in-chief of the military, and the Supreme Court generally has endorsed broad executive power in foreign affairs, particularly for military intervention. The president often has sent troops to fight without a declaration of war, but Congress invariably supports. Technically, the president should get Congress's approval under the War Powers Act, but if Americans

are already fighting, it becomes very difficult for Congress to say no.

### 14-3 Explain how political elites and public opinion influence American foreign policy.

Elite views matter greatly because most Americans pay little attention to foreign affairs most of the time. And on many key issues, the public disagrees with elites. But when the president sends troops overseas to fight, the public will rally in support.

### 14-4 Explain the key challenges that the United States faces in foreign affairs and defense politics today.

In the 21st century, the United States faces the challenges of protecting American national security, combating terrorism, and exercising global leadership to advance American ideals and interests. To achieve these goals, the United States must maintain a sufficient defense budget and a well-organized decision-making structure for military choices.

## TO LEARN MORE .....

U.S. Army: [www.army.mil](http://www.army.mil)

U.S. Air Force: [www.af.mil](http://www.af.mil)

U.S. Navy: [www.navy.mil](http://www.navy.mil)

Central Intelligence Agency: [www.cia.gov](http://www.cia.gov)

Department of State: [www.state.gov](http://www.state.gov)

Allison, Graham T. *Essence of Decision: Explaining the Cuban Missile Crisis*. Boston: Little, Brown, 1971. Shows how the decision made by a president during a major crisis was shaped by bureaucratic and organizational factors.

Barnett, Thomas P. M. *The Pentagon's New Map: War and Peace in the Twenty-First Century*. New York: Berkley Books, 2004. Discusses what America's foreign and military policy should be in the global war against terror.

Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. *Report to the President of the United States*. Washington, D.C.: Government Printing Office, 2005. Thorough

examination by a bipartisan group of why American intelligence agencies did not understand Iraq's WMD efforts.

Fisher, Louis. *Presidential War Power*, 3rd rev. ed. Lawrence: University Press of Kansas, 2013. Examines the evolution of executive power in foreign and military affairs from the founding of the American republic to current debates on combating terrorism in the 21st century.

Kissinger, Henry. *White House Years*. Boston: Little, Brown, 1979. A brilliant insider's account of the politics and tactics of "high diplomacy" during the Nixon administration.

Mead, Walter Russell. *Special Providence*. New York: Knopf, 2001. Argues that American foreign policy, though often criticized, has been remarkably successful.

Mueller, John E. *War, Presidents, and Public Opinion*. New York: Wiley, 1973. Best summary of the relationship between presidential foreign policy decisions and public opinion.



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## CHAPTER 15

# American Democracy, Then and Now

### LEARNING OBJECTIVES

- 15-1** Contrast three features of the Old System versus the New System of American government.
- 15-2** Discuss how the structure and policies of the American political system have influenced the growth of the federal government, and the consequences of that growth.
- 15-3** Summarize the key challenges for American democracy in the 21st century.



Like most Americans, you probably worry about some social issues. These might include abortion, crime, drug abuse, civil rights, gun control, homelessness, or school quality. Maybe you have argued about these matters with your friends, discussing what Washington should do about these things. While you argue, remember this—until the mid-20th century all of this talk would have been nonsense. None of these things were matters that people believed the federal government could, or should, do anything about.

## THEN: RESTRAINTS ON THE GROWTH OF GOVERNMENT

When Dwight Eisenhower was president, none of these issues except civil rights was even thought to be a matter for federal policy—and on civil rights, Congress didn't do very much. Our national political agenda was very short. During the Eisenhower administration, we decided to build an interstate highway system, admit Alaska and Hawaii into the union, and fight over the power of labor unions. For *eight years*, these were about the only major domestic political issues. The rest of the time, Washington worried about foreign affairs.

This was about what the Founders had expected, though many of them would have objected to some actions of the Eisenhower administration. Some would have thought Washington shouldn't build any highways because the Constitution did not authorize Congress to make laws about such matters. In their view, the federal government should limit itself to war, peace, interstate commerce, establishing a national currency, and delivering the mail. And for a long time, the prevailing interpretation of the Constitution limited sharply what policies the federal government could adopt. The Supreme Court restricted the authority of the government to regulate business and prevented it from levying an income tax. Most important, the Supreme Court refused, with some exceptions, to allow the delegation of broad discretionary power to administrative agencies.

The Supreme Court could not have maintained this position for as long as it did if it had acted in the teeth of popular opposition. But popular opinion was also against the growth of government. It was not thought legitimate for the federal government to intervene deeply in the economy (even the American Federation of Labor, led by Samuel Gompers, resisted federal involvement in labor-management issues). It was certainly not thought proper for Washington to upset racial segregation as it was practiced in both the North and the South. It took constitutional amendments to persuade Congress that it had the authority to levy an income tax or to prohibit the sale of alcoholic beverages. Even in the 1930s, public opinion polls showed that as many as half the voters were skeptical of a federal unemployment compensation program.

That was the Old System. Today, under the New System, federal politics is not about some small list of problems thought to be truly national; it is about practically everything. It is almost impossible to think of a problem about which Washington has no policy at all, or around which it does not carry on intense debates. Listen to radio talk shows or watch

cable television news, and you will hear discussions about why Washington has a good or bad policy on almost any issue you can imagine.

What is puzzling about this change from the Old System to the New System is that the Constitution is filled with arrangements designed to make it hard, not easy, for the federal government to act. The separation of powers permits the president, Congress, and the courts to check one another; federalism guarantees that states will have an important role to play; and the division of legislative authority between the House and the Senate ensures that each body will be inclined to block the other. To get a new law passed, you have to please a large number of political actors; to get a new one blocked, you have to convince just one congressional committee.

That system made the national government relatively unimportant for many decades. Until well into the 20th century, governors and mayors were more important than the president. Most members of Congress did not serve more than one or two terms in Washington; there didn't seem to be much point in becoming a career legislator because Congress didn't do much, didn't pay much, and wasn't in session for very long.

## NOW: RELAXING THE RESTRAINTS

As we have said, the constraints on federal action have now weakened or disappeared altogether. First, the courts have altered their interpretation of the Constitution in ways that have not only permitted but sometimes even required government action. The Bill of Rights has been extended so that almost all its important provisions are now considered to apply to the states (having been incorporated into the due process clause of the Fourteenth Amendment). This means that a citizen can use the federal courts to alter state policy to a greater degree than ever before. (Overturning state laws that banned abortions or required racially separate schools are two important examples of this change.) The special protection the courts once granted property rights has been reduced substantially so that business can be regulated to a greater degree than before. The Court has permitted Congress to give broad discretionary powers to administrative agencies, allowing bureaucrats to make decisions that once only Congress could make.

Second, public opinion has changed in ways that support an expanded role for the federal government. The public demanded action to deal with the Great Depression (the programs that resulted, such as Social Security, survived in part because the Supreme Court changed its mind about the permissible scope of federal action). Political elites changed their minds faster than the average citizen. Well-educated, politically active people began demanding federal policies regarding civil rights, public welfare, environmental protection, consumer safety, and foreign aid well before the average citizen became concerned with such things.

Once in place, most of these programs proved popular, so their continuance was supported by mass as well as elite opinion. The cumulative effect of this process was to blur, if



not erase altogether, the line that once defined what the government had the authority to do. At one time, a new proposal was debated in terms of whether it was *legitimate* for the federal government to do it at all. Federal aid to education, for example, usually was opposed because many people feared it would lead to federal control of local schools. But after so many programs had been passed, including federal aid to education, people stopped arguing about a certain policy's legitimacy and argued instead about its *effectiveness*.

Third, political resources have become more widely distributed. The number and variety of interest groups have increased enormously. The funds available from foundations for organizations pursuing specific causes have grown. It is now easier to get access to the federal courts than formerly was the case, and once in the courts the plaintiffs are more likely to encounter judges who believe that the law and the Constitution should be interpreted broadly to permit particular goals (e.g., prison reform) to be attained by legal rather than legislative means. Hundreds of news sources provide policy information to specialized segments of opinion. The techniques of mass protest—linked to the media's need to show visually interesting accounts of social conflict—have been perfected in ways that convey the beliefs of a few into the living rooms of millions.

Campaign finance laws and court rulings have given legal status and constitutional protection to thousands of political action committees (PACs) that raise and spend tens of millions of dollars from millions of small-time contributors. College education, once the privilege of a tiny minority, has become the common experience of millions of people, so that the effects of college—in encouraging political participation and in shaping political beliefs (usually in a liberal direction)—are now widely shared. The ability of candidates to win nomination for office no longer depends on their ability to curry favor with a few powerful bosses; it now reflects their skill at raising money, mobilizing friends and activists, cultivating a media image, and winning a primary election.

## 15-1 The Old Versus the New System

So great have been the changes in the politics of policymaking in this country starting in the 1930s that we can refer, with only slight exaggeration, to one policymaking system having been replaced by another (see Table 15-1).

### The Old System

The Old System had a small agenda. Though people voted at a high rate and often took part in torchlight parades and other mass political events, political leadership was professionalized in the sense that the leadership circle was small, access to it was difficult, and the activists in social movements generally were kept out. Only a few major issues were under discussion at any time. A member of Congress had a small staff (if any at all), dealt with his or her colleagues on a personal basis, deferred to the prestige of House and Senate leaders, and tended to become part of some stable coalition (the farm bloc, the labor bloc, the Southern bloc) that persisted across many issues.

When someone proposed adding a new issue to the public agenda, a major debate often arose over whether it was legitimate for the federal government to take action at all on the matter. A dominant theme in this debate was the importance of “states’ rights.” Except in wartime, or during a very brief period when the nation expressed interest in acquiring colonies, the focus of policy debate was on domestic affairs. Members of Congress saw these domestic issues largely in terms of their effect on local constituencies. The presidency was small and somewhat personal; there was only a rudimentary White House staff. The president would cultivate the press, but there was a clear understanding that what was said in a press conference was never to be quoted directly.

For the government to take bold action under this system, the nation usually had to be facing a crisis. War



## CONSTITUTIONAL CONNECTIONS

### Amending the Constitution

When the Framers drafted the Constitution in the summer of 1787, they expected that it would be an evolving document. Article V of the Constitution provides specifically for two ways of amending the Constitution: amendments may be introduced (1) by a two-thirds vote in Congress or (2) a special convention proposed by two-thirds of the states (the second has never been used). They must then be ratified by (1) three-fourths of the state legislatures or (2) three-fourths of the states in special ratifying conventions (the second has been used just one time, for repealing Prohibition with the Twenty-First Amendment in 1933). In his first inaugural address, President George Washington referred to the amendment process as an “occasional power,” to be used sparingly in “pursuit of the public good.”<sup>1</sup>

As President Washington recommended, the amendment power has been used infrequently. In more than 225 years, 27 amendments have been added to the Constitution, and only a handful of those have changed the structure of the political process. For example, the 17th Amendment gave voters—not state legislatures—the power to elect senators, and the 22nd Amendment limited the president to two terms. But even without constitutional amendments, the American political system has undergone significant political changes, as this chapter’s discussion of the Old System versus the New System explains.

**TABLE 15-1** How American Politics Has Changed

Old system	Congress	New System
Chairs relatively strong		Chairs relatively weak
Small staffs		Large staffs
Few subcommittees		Many subcommittees
Interest Groups		
A few large blocs (farmers, business, labor)		Many diverse interests that form ad hoc coalitions
Rely on “insider” lobbying		Mobilize grassroots
Presidency		
Small staff		Large staff
Reaches public via press conferences		Reaches public via radio, television, and Internet
Courts		
Allow government to exercise few economic powers		Allow government to exercise broad economic power
Take narrow view of individual freedoms		Take broad view of individual freedoms
Political Parties		
Dominated by state and local party leaders meeting in conventions		Dominated by activists chosen in primaries and caucuses
Policy Agenda		
Brief		Long
Key Question		
Should the federal government enter a new policy area?		How can we fix and pay for an existing policy?
Key Issue		
Would a new federal program abridge states’ rights?		Would a new federal program prove popular?

presented such crisis; so during the Civil War and World Wars I and II the federal government acquired extraordinary powers to conscript soldiers, control industrial production, regulate the flow of information to citizens, and restrict the scope of personal liberty. Each succeeding crisis left the government bureaucracy somewhat larger than it had been before, but when the crisis ended, the exercise of extraordinary powers ended. Once again, the agenda of political issues became small, and legislators argued about whether it was legitimate for the government to enter some new policy area, such as civil rights or industrial regulation.

## The New System

The New System began in the 1930s but did not take its present form until the 1970s. It is characterized by a large policy agenda, the end of the debate over the legitimacy of government action (except in the area of First Amendment freedoms), the diffusion and decentralization of power in Congress, and the multiplication of interest groups. The government has grown so large that it has a policy on almost every conceivable subject, and so the debate in Washington is less often about whether it is right and prudent to take



**IMAGE 15-1** Food products now contain health warnings, such as one for nuts in this package of cookies.

some bold new step and more often about how the government can best cope with the strains and problems that arise from implementing existing policies. As someone once said, the federal government is now more concerned with managing than with ruling.

For example, in 1935 Congress debated whether the nation should have a Social Security system at all; in the 1980s, it debated whether the system could best be kept solvent by raising taxes or by cutting benefits; in 2004 and 2005, it debated whether some part of each person's Social Security payments could be invested in the stock market. In the 1960s, Congress argued over whether there should be any federal civil rights laws at all; by the 1980s and 1990s, it was arguing over whether those laws should be administered in a way that simply eliminated legal barriers to equal opportunity for racial minorities, or in a way (by affirmative action) that made up for the disadvantages that burdened such minorities in the past. As late as the 1950s, the president and Congress argued over whether it was right to adopt a new program if it meant the government had to borrow money to pay for it. As late as the 1960s, many members of Congress believed the federal government had no business paying for the health care of its citizens; today, hardly anyone argues against having Medicare, but many worry about how best to control its rising cost.

The differences between the Old and New Systems should not be exaggerated. The Constitution still makes it easier for Congress to block the proposals of the president, or for some committee of Congress to defeat the preferences of the majority of Congress, than in almost any other democratic government. The system of checks and balances operates as before. The essential differences between the Old and the New Systems are these:

1. Under the Old System, the checks and balances made it difficult for the federal government to *start* a new program, and so the government remained relatively small. Under the New System, these checks and balances have made it hard to *change* what the government is already doing, and so the government has remained large.
2. Under the Old System, power was *somewhat centralized* in the hands of party and congressional leaders. There was still plenty of conflict, but the number of people who had to agree before something could be done was not large. Under the New System, power is much more *decentralized*, and so it is harder to resolve conflict because so many more people—party activists, interest-group leaders, individual members of Congress, heads of government agencies—must agree.

The transition from the Old to the New System occurred chiefly during two periods in American politics. The first was in the early 1930s, when a catastrophic depression led the government to explore new ways of helping the needy, regulating business, and preventing a recurrence of the disaster. Franklin Roosevelt's New Deal was the result. The huge majorities enjoyed by the Democrats in Congress, coupled with popular demands to solve the problem, led to a vast outpouring of new legislation and the creation of dozens of new government agencies. Though initially the Supreme Court struck down some of these measures as

unconstitutional, a key member of the Court changed his mind and others retired from the bench; by the late 1930s, the Court had virtually ceased opposing any economic legislation.

The second period was in the mid-1960s, a time of prosperity. There was no crisis akin to the Great Depression or World War II, but two events helped change the face of American politics. One was an intellectual and popular ferment that we now refer to as the spirit of "the sixties": a militant civil rights movement, student activism on college campuses aimed at resisting the Vietnam War, growing concern about threats to the environment, the popular appeal of Ralph Nader and his consumer protection movement, and an optimism among many political and intellectual leaders that the government could solve whatever problems it was willing to address. The other was the 1964 election that returned Lyndon Johnson to the presidency with a larger share of the popular vote than any other president in modern times. Johnson swept into office, and with him came liberal Democratic majorities in both the House and Senate.

The combination of organized demands for new policies, elite optimism about the likely success of those policies, and extraordinary majorities in Congress meant that President Lyndon Johnson was able, for a few years, to get almost any program he wanted enacted into law. So large were his majorities in Congress that the conservative coalition of Republicans and Southern Democrats was no longer large enough to block action; Northern Democratic liberals were sufficiently numerous in the House and Senate to take control of both bodies. Consequently, much of Johnson's "Great Society" legislation became law. This included the passage of Medicare (to help pay the medical bills of retired people) and Medicaid (to help pay the medical bills of people on welfare); greatly expanded federal aid to the states (to assist them in fighting crime, rebuilding slums, and running transit systems); the enactment of major civil rights laws and of a program to provide federal aid to local schools; the creation of a "War on Poverty" that included various job-training and community-action agencies; and the enactment of various laws regulating business for the purpose of reducing auto fatalities, improving the safety and health of industrial workers, cutting back on pollutants entering the atmosphere, and safeguarding consumers from harmful products.

These two periods—the early 1930s and the mid-1960s—changed the political landscape in America. Of the two, the latter was perhaps the more important, for not only did it witness the passage of so much unprecedented legislation, but also it saw major changes in the pattern of political leadership. It was during this time that the great majority of the members of the House of Representatives came to enjoy relatively secure seats, the primary elections came to supplant party conventions as the decisive means of selecting presidential candidates, interest groups increased greatly in number, and television began to play an important role in shaping the political agenda and perhaps influencing the kinds of candidates nominated.





Bill Pugliano/Stringer/Getty Images News/Getty Images

**IMAGE 15-2** The federal government bailed out the U.S. automobile industry in 2009 to help companies avoid bankruptcy.

## 15-2 Government Growth: Influences and Consequences

The enormous expansion of the scope and goals of the federal government has not been random or unguided. The government has tended to enlarge its powers more in some directions than in others; certain kinds of goals have been served more frequently than others. Though many factors shape this process of selection, two are of special importance. One is our constitutional structure, and the other our political culture.

### The Influence of Structure

To see the influence of structure, it is necessary to perform a mental experiment. Suppose the Founders had adopted a centralized, parliamentary regime instead of a decentralized, congressional one. They had the British model right before their eyes. Every other European democracy adopted it. What difference would it have made had we followed the British example?

No one can be certain, of course, because the United States and the United Kingdom differ in many ways, and not just in their political forms. At best, our mental experiment will be an educated guess. But the following possibilities seem plausible.

A parliamentary regime of the British sort centralizes power in the hands of an elected prime minister with a disciplined partisan majority in the legislature and frees him or her from most of the constraints created by independent

congressional committees or independent, activist courts. Had the Framers adopted a parliamentary system, we might see these features in the political life of the United States today:

- *Quicker adoption of majoritarian policies, such as those in the area of social welfare.* Broad popular desires would be translated sooner into national policy when they were highly salient and conform to the views of party leaders.
- *More centralization of bureaucratic authority—more national planning, and less local autonomy.* More decisions would be made bureaucratically, because bureaucracies would be proportionately larger and because they would have wider discretionary authority delegated to them. (If the prime minister heads *both* the executive branch and the legislature, he or she sees no reason why decisions cannot be made as easily in one place as the other.) Local authorities would not have been able to maintain segregated facilities—which have prevented groups of citizens, such as African Americans, from voting or otherwise participating in public life—at the local level.
- *Fewer opportunities for citizens to challenge or block government policies of which they disapprove.* Without independent and activist courts, without local centers (state and city) of autonomous power, U.S. citizens would have less opportunity to organize to stop a highway or an urban-renewal project, for example, and hence fewer citizen organizations with these and similar purposes would exist.





Paul Brenner/Shutterstock.com

**IMAGE 15-3** The 2009 stimulus bill allowed people to get money if they traded in an old car that burned a lot of gas.

- *Greater executive control of government.* If a situation like Watergate occurred, we would never know about it. No legislative investigating committees would be sufficiently independent of executive control to be able to investigate claims of executive wrongdoing.
- *Similar foreign policy.* We probably would have fought in about the same number of wars and under pretty much the same circumstances.
- *Higher and more centralized taxation.* Taxes would be higher, and a larger share of our tax money would be collected at the national level. Thus we would find it harder to wage a “tax revolt,” as Californians did in the 1970s (since it is easier to block local spending decisions than national ones).

If this list of guesses is even approximately correct, it means that you would get more of some things that you want and less of others. In general, it would be easier for temporary majorities to govern and harder for individuals and groups to protect their interests.

The Founders probably would not be surprised at this list of differences. Though they could not have foreseen all the events and issues that would have led to these outcomes, they would have understood them because they thought they were creating a system designed to keep central power weak and to enhance local and citizen power. They would have been amazed, of course, at the extent to which central power has been enhanced and local power weakened in the United States, but if they visited Europe, they would learn that by comparison, American politics remains far more sensitive to local concerns than does politics abroad.

## The Influence of Ideas

The broadly shared political culture of Americans has also influenced the policies adopted by the U.S. government. Paramount among these attitudes is the preoccupation with rights. More than the citizens of perhaps any other nation, Americans define their relations with one another and with political authority in terms of rights. The civil liberties protected by the Bill of Rights have been defended assiduously

and their interpretation broadened significantly even while the power of government has been growing.

For example, we expect that the groups affected by any government program will have a right to play a role in shaping and administering that program. In consequence, interest groups have proliferated. We think citizens should have the right to select the nominees of political parties as well as to choose between the parties; hence primary elections have largely replaced party conventions in selecting candidates. Individual members of Congress assert their rights, and thus the power of congressional leaders and committee chairs has diminished steadily. We probably use the courts more frequently than the citizens of any other nation to make or change public policy; in doing so, we are asserting one set of rights against a competing set. The procedural rules that set forth how government is to act—the Freedom of Information Act, the Privacy Act, the Administrative Procedure Act—are more complex and demanding than the rules under which any other democratic government must operate. Each rule exists because it embodies what somebody has claimed to be a right: to know information, to maintain one’s privacy, to participate in making decisions, and to bring suit against rival parties.

The more vigorously we assert our rights, the harder it is to make government decisions or to manage large institutions. We recognize this when we grumble about red tape and bureaucratic confusion, but we rarely support proposals to centralize authority or simplify decision making. We seem to accept whatever it costs in efficiency or effectiveness to maintain the capacity for asserting our rights.

We do not always agree on which rights are most important, however. In addition to the influence of the widely shared commitment to rights in general, government is also shaped by certain political elites’ views about which rights ought to receive the highest priority. Elite opinion tends to favor freedom of expression over freedom to manage or dispose of property. Mass opinion, though it has changed a good deal in the last few decades, is less committed to the preferred position of freedom of expression. Rank-and-file citizens often complain that what the elite calls essential liberty should instead be regarded as excessive permissiveness. People who own or manage property often lament the extent to which the rights governing its use have declined.

The changes in the relative security of personal and property freedom are linked to a fundamental and enduring tension in American thought. Tocqueville said it best: Americans, he wrote, “are far more ardently and tenaciously attached to equality than to freedom.” Though democratic communities have a “natural taste for freedom,” that freedom is hard to preserve because its excesses are immediate and obvious and its advantages are remote and uncertain. The advantages of equality, on the other hand, are readily apparent, and its costs are obscure and deferred.<sup>2</sup> For example, Americans believe in free speech, but most of us rarely take advantage of that right and notice the problem only when somebody says something we don’t like. We have to remind ourselves that freedom has to be protected even when it does not help us directly. By contrast, we notice equality immediately, as when everybody of a certain age gets Social

Security even when they are already rich. Equality makes us feel comfortable even if a few people don't need the benefits they are getting.

Tocqueville, however, may have underestimated the extent to which political liberties would endure because he did not foresee, in the long run if not the short, the courts' determination to resist the passions of temporary majorities seeking to curtail such liberties. But he did not underestimate, in the economic and social realms, the extent to which Americans would decide that improving the conditions of life would justify restrictions on the right to dispose of property and to manage private institutions. At first, the conflict was between liberty and equality of opportunity. More recently, it has become a conflict—among political elites if not within the citizenry itself—between equality of opportunity and equality of results.

The fact that decisions can be influenced by opinions about rights indicates that decisions can be influenced by opinions in general. The political system has come more under the sway of ideas as it has grown more fragmented and individualized as a result of our collective assertion of rights. When political parties were strong and congressional leadership was centralized (as in the latter part of the 19th and the early part of the 20th centuries), gaining access to the decision-making process in Washington was difficult, and the number of new ideas that stood a chance of adoption was small. However, those proposals that could command leadership support were more easily adopted; though there were powerful organizations that could say no, those same organizations could also say yes.

Today, these and other institutions are fragmented and in disarray. Individual members of Congress are far more important than congressional leaders. Political parties no longer control nominations for office. The media have given candidates direct access to voters; campaign finance laws restrict, but by no means eliminate, the influence of interest groups, particularly by spending money. Forming new, issue-oriented lobbying groups is much easier today than it was formerly, thanks to micro-targeting strategies that use demographic and other data to identify people's interests and concerns.

These idea-based changes in institutions affect how policy is made. When there is widespread enthusiasm for an idea—especially among political elites but also in the public at large—new programs can be formulated and adopted with great speed. This happened when Lyndon Johnson's Great Society legislation was proposed, when the environmental and consumer protection laws first arrived on the public agenda, and when campaign finance reform was proposed in the wake of Watergate. So long as such symbols have a powerful appeal, so long as a consensus persists, change is possible. But when these ideas lose their appeal—or are challenged by new ideas—the competing pressures make change extremely difficult. Environmentalism today is challenged by concerns about creating jobs and economic growth; social legislation is challenged by skepticism about its effectiveness and concern over its cost; campaign finance reforms are, to some critics, merely devices for protecting incumbents.



## HOW WE COMPARE

### Deficit Spending in America and Europe

From 1800 to 1932, the federal government had an annual budget deficit about one-third of the time. In that 132-year stretch, the federal government had large and consecutive annual budget deficits only during the Civil War and again during World War I. From the dawn of the New Deal in 1933 to the eve of the Great Society in 1964, the federal government had an annual budget deficit about five-sixths of the time. Deficit spending soared during World War II, and it was only in each of five subsequent pre-1965 years (1947, 1948, 1956, 1957, and 1960) that the federal budget was in surplus. From 1965 to 2015, a 50-year period, the federal government had an annual budget surplus in each of only two years (1999 and 2000).

America is not the only modern democracy to have settled into a persistent pattern of annual deficit spending, or to run annual deficits that are large relative to the nation's economy. After the 2008 financial crisis, federal deficits were close to 10 percent of U.S. gross domestic product (GDP), but the percentage has declined more recently. For instance, in 2014, the federal deficit was close to 3 percent of U.S. GDP. Here are that year's comparable figures for a host of European democracies: parties no longer control nominations for office. The media have given candidates direct access to the voters; campaign finance laws have restricted, but not eliminated, the influence that interest groups can wield by spending money. Forming new, issue-oriented lobbying groups is much easier today than formerly, thanks to the capability of computers and direct-mail advertising.

<i>Nation</i>	<i>Deficit as a percentage of gross domestic product (2014)</i>
Finland	3.2%
Poland	3.2
Greece	3.5
France	4.0
Ireland	4.1
Portugal	4.5
United Kingdom	5.7
Spain	5.8
Germany	<b>0.7% surplus</b>
Denmark	<b>1.2 surplus</b>

**Sources:** Office of Management and Budget, *Historical Tables: Fiscal Year 2016*, Table 1.1, "Summary of Receipts, Outlays, and Surpluses or Deficits, 1789–2020," and Table 1.2, "Summary of Receipts, Outlays, and Surpluses or Deficits as a Percentage of GDP, 1930–2020"; Eurostat News Release, "Euro Area and EU28 Government Deficit at 2.4 Percent and 2.9 Percent of GDP Respectively," April 21, 2015.

This may all seem obvious to a reader raised in the world of contemporary politics. But it is different in degree, if not in kind, from the way in which politics was once carried out. In the 1920s, the 1930s, the 1940s, and even the 1950s, people described politics as a process of bargaining among organized interests, or “blocs,” representing business, farming, labor, ethnic, and professional groups. With the expansion of the scope of government policy, there are no longer a few major blocs that sit astride the policy process. Instead, thousands of highly specialized interests and constituencies seek, above all, to protect whatever tangible or intangible benefits they get from government.

## Consequences of Government Growth

One way of describing the New System is to call it an “activist” government. It is tempting to make a sweeping judgment about such a government—either praising it because it serves a variety of popular needs or condemning it because it is a bureaucratic affliction. Such generalizations are not entirely empty, but neither are they very helpful. The worth of any given program, or of any collection of programs, can be assessed only by a careful consideration of its costs and benefits, of its effects and side effects. But we may discover some general political consequences of the enlarged scope of government activity.

First, as the government gets bigger, its members must spend more time managing the consequences—intended and unintended—of existing programs and less time debating at length new ideas. As a result, all parts of the government, not just the executive agencies, become more bureaucratized. The White House Office and the Office of Management and Budget (OMB) grow in size and influence, as do the staffs of Congress. At the same time, private organizations (corporations, unions, universities) that deal with the government must also become more bureaucratic. The government hires more people when it is running 80 employment programs than when it is running two. By the same token, a private employer will hire (and give power to) more people when it is complying with 80 sets of regulations than when it is complying with two.

Second, the more government does, the more it will appear to be acting in inconsistent, uncoordinated, and cumbersome ways. When people complain of red tape, bureaucracy, stalemates, and confusion, they often assume these irritants are caused by incompetent or self-seeking public officials. There is incompetence and self-interest in government just as in every other part of society, but these character traits are not the chief cause of the problem. As citizens, we want many different and often conflicting things. The result is the rise of competing policies, the division of labor among separate administrative agencies, the diffusion of accountability and control, and the multiplication of paperwork. And because Americans are especially energetic about asserting their rights, we must add to the above list of problems the regular use of the courts to challenge policies that we do not like.

Third, an activist government is less susceptible than a passive government to control by electoral activity. When the people in Washington did little, elections made a larger

difference in policy than when they began to do a lot. In this book we have discussed the decline in both political parties and voter turnout. There are many reasons for this, but an important one often is forgotten. If elections make less of a difference—because the few people for whom one votes can do little to alter the ongoing programs of government—then it may make sense for people to spend less time on party or electoral activities and more on interest-group activities aimed at specific agencies and programs.

The rapid increase in the number and variety of interest groups and their enlarged role in government are not pathological. They are a rational response to the fact that elected officials can tend to only a few things, and therefore we must direct our energies at the appointed officials (and judges) who tend to all other government matters. Every president tries to accomplish more, usually by trying to reorganize the executive branch. But no president and no reorganization plan can affect more than a tiny fraction of the millions of federal employees and thousands of government programs. “Coordination” from the top can at best occur selectively, for a few issues of exceptional importance.

Ronald Reagan learned this when he took office in 1981 after promising to reduce the size of government. He did persuade Congress to cut taxes and increase defense spending, but his plans to cut domestic spending resulted in only small declines in some programs and actual increases in many others. Though some programs, such as public housing, were hard hit, most were not, and agricultural subsidies increased dramatically.

When George W. Bush became president in 2001, his philosophy was summarized by the phrase “compassionate conservatism”—implying that, though he was a conservative, he was not much interested in simply cutting the size of the federal government. And while in office, he proposed policies that would increase spending on many programs. His actions suggest a fact: cutting down on what Washington does is virtually impossible because the people want so much of what it does.

Finally, the more government tries to do, the more things it will be held responsible for and the greater the risk of failure. From time to time in the 19th century, the business cycle made many people unhappy with the federal government—recall the rise of various protest parties—though then the government did very little. If federal officials were lucky, popular support would rise as soon as economic conditions improved. If they were unlucky and a depression lasted into the election campaign, they would be thrown out of office. Today, however, the government—and the president in particular—is held responsible for crime, drug abuse, abortion, civil rights, the environment, the elderly, the status of women, the decay of central cities, the price of gasoline, and international tensions in half a dozen places around the globe.

No government or president can do well on all, or even most, of these matters most of the time. Indeed, most of these problems, such as crime, may be totally beyond the reach of the federal government, no matter what its policy. It should not be surprising, therefore, that opinion surveys taken since the early 1960s have shown a steep decline



in public confidence in government. There is no reason to believe that this represents a loss of faith in our form of government or even in the design of its institutions, but it clearly reflects a disappointment in, and even cynicism about, the performance of government.

It is too soon to know how, if at all, public sentiments about the performance of government will change in the 21st century. In response to the 2008–2009 economic crisis, Washington expanded government activity faster than it has grown in any period since the late 1930s and the mid-1960s. President Barack Obama proposed a budget for fiscal year 2012 that contemplated a deficit of \$1.645 trillion. Congressional Republicans, who won control of the House in 2010, objected, and threatened not to increase the debt ceiling. After long negotiations with the White House, the two sides agreed on a compromise that made some cuts in spending and raised the debt ceiling. The United States did not default on its financial obligations, thus averting a potential global economic disaster. But two years later, when the White House and Congress could not reach a budget agreement, automatic spending cuts known as the “sequester” went into effect. Later in 2013, the U.S. government shut down for the first time in almost 18 years because the two branches could not complete a budget deal. The government reopened after 16 days, but the long-term consequences for public confidence in the political process remain to be seen. Indeed, the unexpected election of Donald Trump to the presidency in 2016 resulted at least partly from public frustration with the policy-making impasse in Washington.

The spending battles, however, are only half the story. The other half concerns the federal government taking on new responsibilities and challenges: for a time, it was the majority stockholder in what was once the world’s largest automotive company, General Motors; it has more closely controlled dozens of other companies and diverse financial markets; and it has enacted a large, new government-regulated health care system.

University of Maryland political scientist Donald F. Kettl has argued that the “financial meltdown accelerated our expectations that government will keep us safe. . . . We’ve gone from debates over privatizing the public sector to big steps toward governmentalizing the private sector.”<sup>3</sup> The far-reaching changes include “more public money in the private economy, more rules to shape how the private sector behaves, and more citizen expectations that government will manage the risks we face.”<sup>4</sup>

We cannot yet say whether multi-trillion-dollar budget deficits and policies that betoken government-guaranteed corporate capitalism will persist for years to come. But it seems a fair bet that the New System is entering a new era that, not unlike the expansion that began in the late 1930s, has been fueled by economic problems that have afflicted or threatened most Americans.

It also seems likely that, if anything, public disenchantment with government performance will continue to grow along with government’s role in people’s lives. Such disenchantment is hardly unique to the United States; it appears to be a feature of almost every democratic political system. In fact, disenchantment is probably greater elsewhere.

Americans who complain of high taxes might feel somewhat differently if they lived in Sweden, where taxes are nearly twice as high as here. Those who grouse about bureaucrats in this country probably have never dealt with the massive, centralized bureaucracies of Italy or France. People who are annoyed by congestion, pollution, and inflation ought to arrange a trip to Beijing, Mexico City, or Tokyo. However frustrating private life and public affairs may be in this country, every year thousands living in other nations immigrate to this country. Few Americans choose to migrate to other places.

## 15-3 American Democracy—Then, Now, and Next

We have a large government—and large expectations about what it can achieve. But the government finds it increasingly difficult to satisfy those expectations. The public’s acceptance of an increasingly large role for government has been accompanied by a decline in public confidence in those who lead and manage that government. We expect more from government but are less certain that we will get it, or get it in a form and at a cost that we find acceptable. This perhaps constitutes the greatest challenge to political leadership in the years ahead: to find a way to serve the true interests of the people while restoring and retaining their confidence in the legitimacy of government itself. We might begin by challenging the increasingly popular notion that present-day American democracy’s problems are so deep because its political leaders are so shallow, not least by comparison to the nation’s first leaders.

### Then

When the Constitution was created and ratified, national leaders beholden only to their own consciences could meet in secret to debate and decide even the most controversial and consequential questions about government. They could belittle, berate, or battle each other one day and beseech, bargain, or broker deals with each other the next day, all without their words or deeds (or misdeeds) being a matter of public record or widely known at all.

### Now

In stark contrast, the political leaders that today hold office under the terms of that same Constitution, amended only 27 times in more than 225 years, must deliberate and legislate while the whole world—friend and foe alike—is listening and watching. Contemporary presidents and members of Congress face the challenge of leading a large and diverse population, coping with an all-pervasive mass communications media, and steering a federal government that is far bigger, and administered in a way that is far more complicated, than any of the Constitution’s authors ever envisioned.

As a class, today’s elected officials at both ends of Pennsylvania Avenue and in both parties are often much maligned—not only at times by each other and by their other respective partisan and ideological opponents, but by the public at large, with majorities disparaging the “politicians”



about as readily as they denounce the “bureaucrats.” But now reflect seriously on questions like the following:

- How do you suppose James Madison, George Washington, or the other authors of the Constitution would have fared if they had led, not a slave-holding society of barely 4 million people, but a demographically diverse and free society of more than 300 million people?
- How do you think the nation’s early political leaders, bitterly divided over the Constitution as they were (see Chapter 2), would have held up had they faced anything like the incessant public stare and media glare faced routinely by Presidents George W. Bush, Barack Obama, and Donald Trump; House Speakers Nancy Pelosi and Paul Ryan; and other national political leaders—even when not battling with each other?
- Do you believe that in our present-day context, American democracy’s first generation of leaders would come any closer than today’s leaders have to forging a national consensus and getting decisive action on difficult issues like the federal government’s annual budget deficits and the growing national debt?
- As contentious and complicated as the debates over federalism (see Chapter 3) were when the republic was founded, do you think that those who forged the compromises defining federal-state relations then would be significantly more effective than today’s federal, state, and local public officials in ensuring that the more than \$600 billion a year that Washington now spends on grants to state and local governments for social welfare (see Chapter 13) and other public purposes is all money well spent?
- And do you suppose that earlier generations of leaders would be any more adept than today’s leaders in ensuring that the private, for-profit firms and nonprofit organizations that are a big part of today’s proxy-government system of public administration (see Chapter 11) serve the public well?

We suspect that Madison himself, if he were returned to our political moment in time, might conclude that exercising effective leadership now is even harder than it was then.

Regardless, the next chapters in the still-unfolding story of American democracy remain to be written by the nation’s next generation of leaders—including, we hope, some students whose interest in politics, government, and public policy was stirred in part by this book.

- At each level of government, whatever one’s party or policy preferences, to be a public-spirited “politician” who wins elected office and participates in the democratic legislative process, or to be a judge responsible for interpreting and applying laws including in cases that involve civil liberties (see Chapter 4) and civil rights (see Chapter 5), is to live a truly noble calling.
- To be a “bureaucrat”—a career public servant—who serves the public by responsibly translating democratically enacted laws on health, housing, trade, transportation, education, environmental protection, nuclear energy, or any other policy area into administrative action is a truly noble calling, too.
- And, for those who, like most people, are called instead to careers in business, the arts, or other fields, to yet be an engaged citizen of American democracy, to seek to know ever more about American government, political institutions, and public policies, is a most worthy intellectual and civic pastime.

So, we end with words from *Federalist* No. 51 that should remind us all why the subject you have been studying with the aid of this book is so important:

*Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.*

LEARNING OBJECTIVES .....

15-1 Contrast three features of the Old System versus the New System of American government.

Old: Congress had strong committee chairpersons, small staffs, and few subcommittees. New: Congress has weak committee chairpersons, large staffs, and many subcommittees.

Old: The courts allowed government to exercise few economic powers and took a narrow view of individual freedoms. New: The courts allow the government many economic powers and take a broad view of individual freedoms.

Old: Political parties were dominated by local party leaders meeting in conventions. New: Political parties are dominated by activists chosen in primaries and caucuses.

15-2 Discuss how the structure and policies of the American political system have influenced the growth of the federal government, and the consequences of that growth.

The separation of powers in American politics means that the enactment of major policy changes that take place with expansion of the federal government

typically takes much longer than in parliamentary democracies. Furthermore, the wide range of governmental and nongovernmental actors who participate in policymaking brings many different, often competing, ideas for policy change, which complicates consensus-building. As the federal government expands, it also becomes more complex and bureaucratic.

today's presidents and members of Congress make important decisions under intense public scrutiny. They lead a demographically diverse and free society of more than 300 million citizens, with a government that constitutes a much larger share of the nation's economy than any of the Framers ever envisioned, and that touches virtually every facet of contemporary economic, social, and civic life.

**15-3 Summarize the key challenges for American democracy in the 21st century.**

Unlike the authors of the Constitution and most other previous generations of political leaders,

# Appendixes

## The Declaration of Independence

In Congress, July 4, 1776

### THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its power in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world.

He has refused to assent to laws, the most wholesome and necessary for the public good.

He has forbidden his governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and, when so suspended, he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish

the right of representation in the legislature, a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly, for opposing, with manly firmness, his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the state remaining, in the mean time, exposed to all dangers of invasions from without and convulsions within.

He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws, giving his assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these states;

For cutting off our trade with all parts of the world;

For imposing taxes on us without our consent;

For depriving us, in many cases, of the benefits of trial by jury;

For transporting us beyond seas, to be tried for pretended offenses;

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies;

For taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments;

For suspending our own legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here, by declaring us out of his protection and waging war against us.

He has plundered our seas, ravaged our coasts, burned our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny already begun with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrection among us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in our attentions to our British brethren. We have warned them, from time to time, of attempts by their Legislature to extend an unwarrantable jurisdiction over

us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

JOHN HANCOCK [*President*]  
[and fifty-five others]



## The Constitution of the United States

Preamble

*We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

### Article I.

Bicameral Congress

**Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Membership of the House

**Section 2.** The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

*Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.*<sup>1</sup> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode- Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

Power to impeach

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Membership of the Senate

**Section 3.** The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature thereof*<sup>2</sup>, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; *and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies*<sup>3</sup>.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

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*NOTE: The topical headings are not part of the original Constitution. Excluding the Preamble and Closing, those portions set in italic type have been superseded or changed by later amendments.*

*1. Changed by the Fourteenth Amendment, section 2.*

*2. Changed by the Seventeenth Amendment.*

*3. Changed by the Seventeenth Amendment.*

Power to try impeachments	<p>The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.</p> <p>Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.</p>
Laws governing elections	<p><b>Section 4.</b> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.</p> <p>The Congress shall assemble at least once in every Year, and such Meeting shall be on the <i>first Monday in December, unless they shall by Law appoint a different Day.</i><sup>4</sup></p>
Rules of Congress	<p><b>Section 5.</b> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.</p> <p>Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.</p> <p>Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.</p> <p>Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.</p>
Salaries and immunities of members	<p><b>Section 6.</b> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.</p>
Bar on members of Congress holding federal appointive office	<p>No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.</p>
Money bills originate in House	<p><b>Section 7.</b> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.</p>
Procedure for enacting laws; veto power	<p>Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner, as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.</p> <p>Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved</p>

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4. Changed by the Twentieth Amendment, section 2.

by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Powers of Congress—taxes

- borrowing
- regulation of commerce
- naturalization and bankruptcy
- money
- counterfeiting
- post office
- patents and copyrights
- create courts
- punish piracies
- declare war
- create army and navy
- call the militia
- govern District of Columbia
- “necessary-and-proper” clause

**Section 8.** The Congress shall have Power To lay and Collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish a uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the Supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Restrictions on powers of Congress—slave trade

- habeas corpus
- no bill of attainder or ex post facto law
- no interstate tariffs
- no preferential treatment for some states
- appropriations

**Section 9.** The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, *unless in Proportion to the Census or Enumeration herein before directed to be taken.*<sup>5</sup>

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

5. Changed by the Sixteenth Amendment.

—no titles of nobility

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Restrictions on powers of states

**Section 10.** No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws; and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

## Article II.

Office of president

**Section 1.** The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Election of president

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

*The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.<sup>6</sup>*

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes, which Day shall be the same throughout the United States.

Requirements to be president

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

*In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.<sup>7</sup>*

6. Superseded by the Twelfth Amendment.

7. Modified by the Twenty-fifth Amendment.



## Pay of president

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability preserve, protect and defend the Constitution of the United States."

## Powers of president

—*commander in chief*

—*pardons*

**Section 2.** The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

—*treaties and appointments*

## Relations of president with Congress

**Section 3.** He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

## Impeachment

**Section 4.** The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

### Article III.

## Federal courts

**Section 1.** The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

## Jurisdiction of courts

**Section 2.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;— *between a State and Citizens of another State*; <sup>8</sup> —between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

—*original*

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

—*appellate*

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

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8. Modified by the Eleventh Amendment.

Treason

**Section 3.** Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

#### Article IV.

Full faith and credit

**Section 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Privileges and immunities

**Section 2.** The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Extradition

A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

*No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.*<sup>9</sup>

Creation of new states

**Section 3.** New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

Governing territories

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Protection of states

**Section 4.** The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

#### Article V.

Amending the Constitution

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner alter the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

#### Article VI.

Assumption of debts of Confederation  
Supremacy of federal laws and treaties

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

No religious test

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

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9. Changed by the Thirteenth Amendment.

**Article VII.**

Ratification procedure

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

*Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth In witness whereof We have hereunto subscribed our Names,*

G<sup>o</sup>. WASHINGTON — *Presidt.*  
*and deputy from Virginia*

<i>New Hampshire</i>	<div><div>J. LANGDON</div><div>N. GILMAN</div></div>	<i>Maryland</i>	<div><div>J. M<sup>c</sup>HENRY</div><div>D. OF ST. T. JENIFER</div><div>D. CARROLL</div></div>
<i>Massachusetts</i>	<div><div>N. GORHAM</div><div>R. KING</div></div>	<i>Virginia</i>	<div><div>J. BLAIR—</div><div>J. MADISON JR.</div></div>
<i>New Jersey</i>	<div><div>W. LIVINGSTON</div><div>D. BREARLEY</div><div>W. PATERSON</div><div>J. DAYTON</div></div>	<i>North Carolina</i>	<div><div>W. BLOUNT</div><div>R. DOBBS SPAIGHT</div><div>H. WILLIAMSON</div></div>
<i>Pennsylvania</i>	<div><div>B. FRANKLIN</div><div>T. MIFFLIN</div><div>R. MORRIS</div><div>G. CLYMER</div><div>T. FITZSIMONS</div><div>J. INGERSOLL</div><div>J. WILSON</div><div>G. MORRIS</div></div>	<i>South Carolina</i>	<div><div>J. RUTLEDGE</div><div>C. COTESWORTH PINCKNEY</div><div>C. PINCKNEY</div><div>P. BUTLER</div></div>
<i>Connecticut</i>	<div><div>W. JOHNSON</div><div>R. SHERMAN</div></div>	<i>Delaware</i>	<div><div>G. READ</div><div>G. BEDFORD JUN</div><div>J. DICKINSON</div><div>R. BASSETT</div><div>J. BROOM</div></div>
<i>New York</i>	<div><div>A. HAMILTION</div></div>	<i>Georgia</i>	<div><div>W. FEW</div><div>A. BALDWIN</div></div>

*[The first ten amendments, known as the “Bill of Rights,” were ratified in 1791.]*

**AMENDMENT I.**

Freedom of religion, speech,  
press, assembly

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**AMENDMENT II.**

Right to bear arms

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

**AMENDMENT III.**

Quartering troops in private  
homes

No Soldier shall, in time of peace be quartered in any house without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

**AMENDMENT IV.**

Prohibition against unreasonable  
searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

**AMENDMENT V.**

Right when accused;  
“due-process” clause

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

**AMENDMENT VI.**

Rights when on trial

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**AMENDMENT VII.**

Common-law suits

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

**AMENDMENT VIII.**

Bail; no “cruel and unusual”  
punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**AMENDMENT IX.**

Unenumerated rights protected

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**AMENDMENT X.**

Powers reserved for states

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.



## AMENDMENT XI.

*[Ratified in 1795.]*

Limits on suits against states

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.

## AMENDMENT XII.

*[Ratified in 1804.]*

Revision of electoral-college procedure

The Electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. *And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President.*—<sup>10</sup> The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

## AMENDMENT XIII.

*[Ratified in 1865.]*

Slavery prohibited

**Section 1.** Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

**Section 2.** Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XIV.

*[Ratified in 1868.]*

Ex-slaves made citizens

**Section 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

“Due-process” clause applied to states  
“Equal-protection” clause

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10. Changed by the Twentieth Amendment, section 3.

Reduction in congressional representation for states denying adult males the right to vote

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being *twenty-one*<sup>11</sup> years of age and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Southern rebels denied federal office

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Rebel debts repudiated

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

**Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## AMENDMENT XV.

*[Ratified in 1870.]*

Blacks given right to vote

**Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

**Section 2.** The Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XVI.

*[Ratified in 1913.]*

Authorizes federal income tax

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

## AMENDMENT XVII.

*[Ratified in 1913.]*

Requires popular election of senators

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

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11. Changed by the Twenty-sixth Amendment.

## AMENDMENT XVIII.

*[Ratified in 1919.]*

Prohibits manufacture and sale of liquor

**Section 1.** After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

**Section 2.** The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

**Section 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.<sup>12</sup>

## AMENDMENT XIX.

*[Ratified in 1920.]*

Right to vote for women

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XX.

*[Ratified in 1933.]*

Federal terms of office to begin in January

**Section 1.** The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

**Section 2.** The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Emergency presidential succession

**Section 3.** If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

**Section 4.** The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

**Section 5.** Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

**Section 6.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

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12. Repealed by the Twenty-first Amendment.

**AMENDMENT XXI.**

*[Ratified in 1933.]*

Repeals Prohibition

**Section 1.** The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

**Section 2.** The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

**Section 3.** This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of submission hereof to the States by the Congress.

**AMENDMENT XXII.**

*[Ratified in 1951.]*

Two-term limit for president

**Section 1.** No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

**Section 2.** This Article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

**AMENDMENT XXIII.**

*[Ratified in 1961.]*

Right to vote for president in District of Columbia

**Section 1.** The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

**Section 2.** The Congress shall have power to enforce this article by appropriate legislation.

**AMENDMENT XXIV.**

*[Ratified in 1964.]*

Prohibits poll taxes in federal elections

**Section 1.** The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

**Section 2.** The Congress shall have the power to enforce this article by appropriate legislation.



## AMENDMENT XXV.

*[Ratified in 1967.]*

Presidential disability and succession

**Section 1.** In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

**Section 2.** Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

**Section 3.** Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

**Section 4.** Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department[s] or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within fortyeight hours for that purpose if not in session. If the Congress, within twentyone days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

## AMENDMENT XXVI.

*[Ratified in 1971.]*

Voting age lowered to eighteen

**Section 1.** The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

**Section 2.** The Congress shall have power to enforce this article by appropriate legislation.

## AMENDMENT XXVII.

*[Ratified in 1992.]*

Congressional pay raises

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

## A Brief Guide To Reading The Federalist Papers

In 1787, to help win ratification of the new Constitution in the New York state convention, Alexander Hamilton decided to publish a series of articles defending and explaining the document in the New York City newspapers. He recruited John Jay and James Madison to help him, and the three of them, under the pen name “Publius,” wrote 85 articles that appeared from late 1787 through 1788. The identity of the authors was kept secret at the time, but we now know that Hamilton wrote 51 of them, Madison 26, and Jay five, and that Hamilton and Madison jointly authored three.

The *Federalist* papers probably played only a small role in securing ratification. Like most legislative battles, this one was not decisively influenced by philosophical writings. But these essays have had a lasting value as an authoritative and profound explanation of the Constitution. Though written for political purposes, the *Federalist* has become the single most important piece of American political philosophy ever produced. Ironically, Hamilton and Madison were later to become political enemies; even at the Philadelphia convention they had different views of the kind of government that should be created. But in 1787–1788, they were united in the belief that the new constitution was the best that could have been obtained under the circumstances.

Although Hamilton wrote most of the *Federalist* papers, Madison wrote the two most famous articles—Nos. 10 and 51, reprinted here in the Appendix. On your first reading of the papers, you may find Madison’s language difficult to understand and his ideas overly complex. The following pointers will help you decipher his meaning.

In *Federalist* No. 10, Madison begins by stating that “a well constructed Union” can “break and control the violence of faction.” He goes on to define a *faction* as any group of citizens who attempt to advance their ideas or economic interests at the expense of other citizens, or in ways that conflict with “the permanent and aggregate interests of the community” or “public good.” Thus what Madison terms “factions” are what we today call “special interests.”

One way to defeat factions, according to Madison, is to remove whatever causes them to arise in the first place. This can be attempted in two ways. First, government can deprive people of the liberty they need to organize: “Liberty is to faction what air is to fire.” But that is surely a cure “worse than the disease.” Second, measures can be taken to make all citizens share the same ideas, feelings, and economic interests. However, as Madison observes, some people are smarter or more hard-working than others, and this “diversity in the faculties” of citizens is bound to result in different economic interests as some people acquire more property than others. Consequently, protecting property rights, not equalizing property ownership, “is the first object of government.” Even if everyone shared the same basic economic interests, they would still find reasons “to vex and oppress each other” rather than cooperate “for their common good.” Religious differences, loyalties to different leaders, even “frivolous and fanciful distinctions” (not liking how other people dress or their taste in music) can be fertile soil for factions. In Madison’s view, people are factious by nature; the “causes of faction” are “sown” into their very being.

Madison thus proposes a second and, he thinks, more practical and desirable way of defeating faction. The way to cure “the mischiefs of faction” is not by removing its causes but by “controlling its effects.” Factions will always exist, so the trick is to establish a form of government that is likely to serve the public good through the even-handed “regulation of these various and interfering interests.” Wise and public-spirited leaders can “adjust these clashing interests and -render them all subservient to the public good,” but, he cautions, “enlightened statesmen will not always be at the helm.” (Madison implies that “enlightened statesmen”—such as himself, Washington, and Jefferson—were at the “helm” of government in 1787.)

Madison’s proposed cure for the evils of factions is in fact nothing other than a republican form of government. Use the following questions to guide your own analysis of Madison’s ideas. Why does Madison think the problem of a “minority” faction is easy to handle? Conversely, why is he so troubled by the potential of a majority faction? How does he distinguish direct democracy from republican government? What is he getting at when he terms elected representatives “proper guardians of the public weal,” and why does he think that “extensive republics” are more likely to produce such representatives than small ones?

When you are finished with *Federalist* No. 10, try your hand at *Federalist* No. 51. You will find that the ideas in the former paper anticipate many of those in the latter. And you will find many points on which you may or may not agree with Madison. For example, do you agree with his assumption that people—even your best friends or college roommates—are factious by nature? Likewise, do you agree with his view that government is “the greatest of all reflections on human nature”?

By attempting to meet the mind of James Madison, you can sharpen your own mind and deepen your understanding of American government.

## **The Federalist No. 10**

November 22, 1787

*James Madison*

### **TO THE PEOPLE OF THE STATE OF NEW YORK.**

Among the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular governments, never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail therefore to set a due value on any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice and confusion introduced into the public councils, have in truth been the mortal diseases under which popular governments have every where perished; as they continue to be the favorite and fruitful topics from which the adversaries to liberty derive their most specious declamations. The valuable improvements made by the American Constitutions on the popular models, both ancient and modern, cannot certainly be too much admired; but it would be an unwarrantable partiality, to contend that they have as effectually obviated the danger on this side as was wished and expected. Complaints are everywhere heard from our most considerate and virtuous citizens, equally the friends of public and private faith, and of public and personal liberty; that our governments are too unstable; that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, not according to the rules of justice, and the rights of the minor party; but by the superior force of an interested and over-bearing majority. However anxiously we may wish that these complaints had no foundation, the evidence of known facts will not permit us to deny that they are in some degree true. It will be found indeed, on a candid review of our situation, that some of the distresses under which we labor, have been erroneously charged on the operation of our governments; but it will be found, at the same time, that other causes will not alone account for many of our heaviest misfortunes; and particularly, for that prevailing and increasing distrust of public engagements, and alarm for private rights, which are echoed from one end of the continent to the other. These must be chiefly, if not wholly, effects of the unsteadiness and injustice, with which a factious spirit has tainted our public administrations.

By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.

There are again two methods of removing the causes of faction: the one by destroying the liberty which is essential to its existence; the other, by giving to every citizen the same opinions, the same passions, and the same interests.

It could never be more truly said than of the first remedy, that it is worse than the disease. Liberty is to faction, what air is to fire, an aliment without which it instantly expires. But it could not be a less folly to abolish liberty, which is essential to political life, because it nourishes faction, than it would be to wish the annihilation of air, which is essential to animal life, because it imparts to fire its destructive agency.

The second expedient is as impracticable, as the first would be unwise. As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of Government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results: and from the influence of these on the sentiments and views of the respective proprietors, ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them every where brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning Government and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously

contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interesting to the human passions, have in turn divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other, than to cooperate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions, and excite their most violent conflicts. But the most common and durable source of factions, has been the various and unequal distribution of property. Those who hold, and those who are without property, have ever formed distinct interests in society. Those who are creditors, and those who are debtors, fall under a like discrimination. A landed interest, a manufacturing interest, a mercantile interest, a monied interest, with many lesser interests, grow up of necessity in civilized nations, and divide them into different classes, actuated by different sentiments and views. The regulation of these various and interfering interests forms the principal task of modern Legislation, and involves the spirit of party and faction in the necessary and ordinary operations of Government.

No man is allowed to be judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men, are unfit to be judges and parties, at the same time; yet, what are many of the most important acts of legislation, but so many judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens, and what are the different classes of legislators, but advocates and parties to the causes which they determine? Is a law proposed concerning private debts? It is a question to which the creditors are parties on one side, and the debtors on the other. Justice ought to hold the balance between them. Yet the parties are and must be themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail. Shall domestic manufactures be encouraged, and in what degree, by restrictions on foreign manufactures? are questions which would be differently decided by the landed and the manufacturing classes; and probably by neither, with a sole regard to justice and the public good. The apportionment of taxes on the various descriptions of property, is an act which seems to require the most exact impartiality; yet, there is perhaps no legislative act in which greater opportunity and temptation are given to a predominant party, to trample on the rules of justice. Every shilling with which they over-burden the inferior number, is a shilling saved to their own pockets.

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: Nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.

The inference to which we are brought, is, that the *causes* of faction cannot be removed; and that relief is only to be sought in the means of controlling its *effects*.

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote: It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government on the other hand enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed: Let me add that it is the great desideratum, by which alone this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.

By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time, must be prevented; or the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together; that is, in proportion as their efficacy becomes needful.

From this view of the subject, it may be concluded, that a pure Democracy, by which I mean, a Society, consisting of a small number of citizens, who assemble and administer the



Government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the form of Government itself; and there is nothing to check the inducements to sacrifice the weaker party, or an obnoxious individual. Hence it is, that such Democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security, or the rights of property; and have in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronized this species of Government, have erroneously supposed, that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking. Let us examine the points in which it varies from pure democracy, and we shall comprehend both the nature of the cure and the efficacy which it must derive from the union.

The two great points of difference, between a democracy and a republic, are, first, the delegation of the government, in the latter, to a small number of citizens, elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

The effect of the first difference is, on the one hand, to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial considerations. Under such a regulation, it may well happen, that the public voice, pronounced by the representatives of the people, will be more consonant to the public good, than if pronounced by the people themselves, convened for the purpose. On the other hand the effect may be inverted. Men of factious tempers, of local prejudices, or of sinister designs, may by intrigue, by corruption, or by other means, first obtain the suffrages, and then betray the interest of the people. The question resulting is, whether small or extensive republics are most favorable to the election of proper guardians of the public weal, and it is clearly decided in favor of the latter by two obvious considerations.

In the first place, it is to be remarked that, however small the republic may be, the representatives must be raised to a certain number, in order to guard against the cabals of a few; and that however large it may be, they must be limited to a certain number, in order to guard against the confusion of a multitude. Hence, the number of representatives in the two cases not being in proportion to that of the constituents, and being proportionally greatest in the small republic, it follows, that if the proportion of fit characters be not less in the large than in the small republic, the former will present a greater option, and consequently a greater probability of a fit choice.

In the next place, as each Representative will be chosen by a greater number of citizens in the large than in the small Republic, it will be more difficult for unworthy candidates to practise with success the vicious arts, by which elections are too often carried; and the suffrages of the people being more free, will be more likely to center on men who possess the most attractive merit, and the most diffusive and established characters.

It must be confessed, that in this, as in most other cases, there is a mean, on both sides of which inconveniences will be found to lie. By enlarging too much the number of electors, you render the representatives too little acquainted with all their local circumstances and lesser interests; as by reducing it too much, you render him unduly attached to these, and too little fit to comprehend and pursue great and national objects. The Federal Constitution forms a happy combination in this respect; the great and aggregate interests being referred to the national, the local and particular, to the state legislatures.

The other point of difference is, the greater number of citizens and extent of territory which may be brought within the compass of Republican, than of Democratic Government; and it is this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter. The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily they will concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will

be more difficult for all who feel it to discover their own strength, and to act in unison with each other. Besides other impediments, it may be remarked, that where there is a consciousness of unjust or dishonorable purposes, communication is always checked by distrust, in proportion to the number whose concurrence is necessary.

Hence it clearly appears, that the same advantage, which a Republic has over a Democracy, in controlling the effects of factions, is enjoyed by a large over a small Republic—is enjoyed by the Union over the States composing it. Does this advantage consist in the substitution of Representatives, whose enlightened views and virtuous sentiments render them superior to local prejudices, and to schemes of injustice? It will not be denied, that the Representation of the Union will be most likely to possess these requisite endowments. Does it consist in the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the increase variety of parties, comprised within the Union, increase this security? Does it, in fine, consist in the greater obstacles opposed to the concert and accomplishment of the secret wishes of an unjust and interested majority? Here, again, the extent of the Union gives it the most palpable advantage.

The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States: a religious sect, may degenerate into a political faction in a part of the Confederacy but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source: a rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

In the extent and proper structure of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government. And according to the degree of pleasure and pride, we feel in being Republicans, ought to be our zeal in cherishing the spirit, and supporting the character of Federalists.

PUBLIUS

## **The Federalist No. 51**

February 6, 1788

*James Madison*

### **TO THE PEOPLE OF THE STATE OF NEW YORK.**

To what expedient then shall we finally resort for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places. Without presuming to undertake a full development of this important idea, I will hazard a few general observations, which may perhaps place it in a clearer light, and enable us to form a more correct judgment of the principles and structure of the government planned by the convention.

In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted, that the members of each should have as little agency as possible in the appointment of the members of the others. Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies, should be drawn from the same fountain of authority, the people, through channels, having no communication whatever with one another. Perhaps such a plan of constructing the several departments would be less difficult in practice than in it may in contemplation appear. Some difficulties however, and some additional expense, would attend the execution of it. Some deviations therefore from the principle must be admitted. In the constitution of the judiciary department in particular, it might be inexpedient to insist rigorously on the principle; first, because peculiar qualifications being essential in the members, the primary consideration ought to be to select that mode of choice, which best secures these qualifications; secondly, because the permanent tenure by which the appointments are held in that department, must soon destroy all sense of dependence on the authority conferring them.

It is equally evident that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional right of the place. It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

This policy of supplying by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.

But it is not possible to give each department an equal power of self defense. In republican government the legislative authority, necessarily, predominates. The remedy for this inconvenience is, to divide the legislative into different branches; and to render them by different modes of election, and different principles of action, as little connected with each other, as the nature of their common functions, and their common dependence on the society, will admit. It may even be necessary to guard against dangerous encroachments by still further precautions. As the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified. An absolute negative, on the legislature, appears at first view to be the natural defense with which the executive magistrate should be armed. But perhaps it would be neither altogether safe, nor alone sufficient. On ordinary occasions, it might not be exerted with the requisite firmness, and on extraordinary occasions, it might be perversely abused. May not this defect of an absolute negative be supplied, by some qualified connection between this weaker department, and the weaker branch of the stronger department, by which the latter may be led to support the constitutional rights of the former, without being too much detached from the rights of its own department?

If the principles on which these observations are founded be just, as I persuade myself they are, and they be applied as a criterion, to the several state constitutions, and to the federal constitution, it will be found, that if the latter does not perfectly correspond with them, the former are infinitely less able to bear such a test.

There are moreover two considerations particularly applicable to the federal system of America, which place the system in a very interesting point of view.

*First.* In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.

*Second.* It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself, the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self appointed authority. This at best is but a precarious security; because a power independent of the society may as well espouse the unjust views of the major, as the rightful interests, of the minor party, and may possibly be turned against both parties. The second method will be exemplified in the federal republic of the United States. While all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority, will be in little danger from interested combinations of the majority. In a free government, the security for civil rights must be the same as for religious rights. It consists in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects; and this may be presumed to depend on the extent of country and number of people comprehended under the same government. This view of the subject must particularly recommend a proper federal system to all the sincere and considerate friends of republican government: Since it shows that in exact proportion as the territory of the union may be formed into more circumscribed confederacies or states, oppressive combinations of a majority will be facilitated, the best security under the republican form, for the rights of every class of citizens, will be diminished; and consequently, the stability and independence of some member of the government, the only other security, must be proportionally increased. Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign, as in a state of nature where the weaker individual is not secured against the violence of the stronger: And as in the latter state



even the stronger individuals are prompted by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves: So in the former state, will the more powerful factions or parties be gradually induced by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful. It can be little doubted, that if the state of Rhode Island was separated from the confederacy, and left to itself, the insecurity of rights under the popular form of government within such narrow limits, would be displayed by such reiterated oppressions of factious majorities, that some power altogether independent of the people would soon be called for by the voice of the very factions whose misrule had proved the necessity of it. In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; and there being thus less danger to a minor from the will of the major party, there must be less pretext also, to provide for the security of the former, by introducing into the government a will not dependent on the latter; or in other words, a will independent of the society itself. It is no less certain than it is important, notwithstanding the contrary opinions which have been entertained, that the larger the society, provided it lie within a practicable sphere, the more duly capable it will be of self government. And happily for the *republican cause*, the practicable sphere may be carried to a very great extent, by a judicious modification and mixture of the *federal principle*.

PUBLIUS

## Presidents and Congresses, 1789–2021

Year	President and Vice President	Party of President	Congress	House		Senate	
				Majority Party	Minority Party	Majority Party	Minority Party
1789–1797	<b>George Washington</b>	None	1st	38 Admin	26 Opp	17 Admin	9 Opp
	John Adams		2d	37 Fed	33 Dem-Rep	16 Fed	13 Dem-Rep
			3d	<b>57 Dem-Rep</b>	<b>48 Fed</b>	17 Fed	13 Dem-Rep
			4th	54 Fed	52 Dem-Rep	19 Fed	13 Dem-Rep
1797–1801	<b>John Adams</b>	Federalist	5th	58 Fed	48 Dem-Rep	20 Fed	12 Dem-Rep
	Thomas Jefferson		6th	64 Fed	42 Dem-Rep	19 Fed	13 Dem-Rep
1801–1809	<b>Thomas Jefferson</b>	Dem-Rep	7th	69 Dem-Rep	36 Fed	18 Dem-Rep	13 Fed
	Aaron Burr–(to 1805)		8th	102 Dem-Rep	39 Fed	25 Dem-Rep	9 Fed
	George Clinton (to 1809)		9th	116 Dem-Rep	25 Fed	27 Dem-Rep	7 Fed
			10th	118 Dem-Rep	24 Fed	28 Dem-Rep	6 Fed
1809–1817	<b>James Madison</b>	Dem-Rep	11th	94 Dem-Rep	48 Fed	28 Dem-Rep	6 Fed
	George Clinton (to 1813)		12th	108 Dem-Rep	36 Fed	30 Dem-Rep	6 Fed
	Elbridge Gerry (to 1817)		13th	112 Dem-Rep	68 Fed	27 Dem-Rep	9 Fed
			14th	117 Dem-Rep	65 Fed	25 Dem-Rep	11 Fed
1817–1825	<b>James Monroe</b>	Dem-Rep	15th	141 Dem-Rep	42 Fed	34 Dem-Rep	10 Fed
	Daniel D. Tompkins		16th	156 Dem-Rep	27 Fed	35 Dem-Rep	7 Fed
			17th	158 Dem-Rep	25 Fed	44 Dem-Rep	4 Fed
			18th	187 Dem-Rep	26 Fed	44 Dem-Rep	4 Fed
1825–1829	<b>John Quincy Adams</b>	Nat-Rep	19th	105 Admin	97 Jack	26 Admin	20 Jack
	John C. Calhoun		20th	<b>119 Jack</b>	<b>94 Admin</b>	<b>28 Jack</b>	<b>20 Admin</b>
1829–1837	<b>Andrew Jackson</b>	Democrat	21st	139 Dem	74 Nat Rep	26 Dem	22 Nat Rep
	John C. Calhoun (to 1833)		22d	141 Dem	58 Nat Rep	25 Dem	21 Nat Rep
	Martin Van Buren (to 1837)		23d	147 Dem	53 AntiMas	20 Dem	20 Nat Rep
			24th	145 Dem	98 Whig	27 Dem	25 Whig
1837–1841	<b>Martin Van Buren</b>	Democrat	25th	108 Dem	107 Whig	30 Dem	18 Whig
	Richard M. Johnson		26th	124 Dem	118 Whig	28 Dem	22 Whig
1841	<b>William H. Harrison*</b>	Whig					
	John Tyler						
1841–1845	<b>John Tyler</b>	Whig	27th	133 Whig	102 Dem	28 Whig	22 Dem
	(VP vacant)		28th	<b>142 Dem</b>	<b>79 Whig</b>	28 Whig	25 Dem
1845–1849	<b>James K. Polk</b>	Democrat	29th	143 Dem	77 Whig	31 Dem	25 Whig
	George M. Dallas		30th	<b>115 Whig</b>	<b>108 Dem</b>	36 Dem	21 Whig
1849–1850	<b>Zachary Taylor*</b>	Whig	31st	<b>112 Dem</b>	<b>109 Whig</b>	<b>35 Dem</b>	<b>25 Whig</b>
	Millard Fillmore						

**NOTES:** Only members of two major parties in Congress are shown; omitted are independents, members of minor parties, and vacancies. Party balance as of beginning of Congress.

Congresses in which one or both houses are controlled by party other than that of the president are shown in color.

During administration of George Washington and (in part) John Quincy Adams, Congress was not organized by formal parties; the split shown is between supporters and opponents of the administration.

ABBREVIATIONS: **Admin** = Administration supporters; **AntiMas** = Anti-Masonic; **Dem** = Democratic; **Dem-Rep** = Democratic-Republican; **Fed** = Federalist; **Jack** = Jacksonian Democrats; **Nat Rep** = National Republican; **Opp** = Opponents of administration; **Rep** = Republican; **Union** = Unionist; **Whig** = Whig.

\*Died in office.

Year	President and Vice President	Party of President	Congress	House		Senate	
				Majority Party	Minority Party	Majority Party	Minority Party
1850–1853	<b>Millard Fillmore</b> (VP vacant)	Whig	32d	<b>140 Dem</b>	<b>88 Whig</b>	<b>35 Dem</b>	<b>24 Whig</b>
1853–1857	<b>Franklin Pierce</b> William R. King	Democrat	33d 34th	159 Dem <b>108 Rep</b>	71 Whig <b>83 Dem</b>	38 Dem 40 Dem	22 Whig 15 Rep
1857–1861	<b>James Buchanan</b> John C. Breckinridge	Democrat	35th 36th	118 Dem <b>114 Rep</b>	92 Rep <b>92 Dems</b>	36 Dem 36 Dem	20 Rep 26 Rep
1861–1865	<b>Abraham Lincoln*</b> Hannibal Hamlin (to 1865) Andrew Johnson (1865)	Republican	37th 38th	105 Rep 102 Rep	43 Dem 75 Dem	31 Rep 36 Rep	10 Dem 9 Dem
1865–1869	<b>Andrew Johnson</b> (VP vacant)	Republican	39th 40th	149 Union 143 Rep	42 Dem 49 Dem	42 Union 42 Rep	10 Dem 11 Dem
1869–1877	<b>Ulysses S. Grant</b> Schuyler Colfax (to 1873) Henry Wilson (to 1877)	Republican	41st 42d 43d 44th	149 Rep 134 Rep 194 Rep <b>169 Dem</b>	63 Dem 104 Dem 92 Dem <b>109 Rep</b>	56 Rep 52 Rep 49 Rep 45 Rep	11 Dem 17 Dem 19 Dem 29 Dem
1877–1881	<b>Rutherford B. Hayes</b> William A. Wheeler	Republican	45th 46th	<b>153 Dem</b> <b>149 Dem</b>	<b>140 Rep</b> <b>130 Rep</b>	39 Rep 42 Dem	36 Dem 33 Rep
1881	<b>James A. Garfield*</b> Chester A. Arthur	Republican	47th	147 Rep	135 Dem	37 Rep	37 Dem
1881–1885	<b>Chester A. Arthur</b> (VP vacant)	Republican	48th	<b>197 Dem</b>	<b>118 Rep</b>	38 Rep	36 Rep
1885–1889	<b>Grover Cleveland</b> Thomas A. Hendricks	Democrat	49th 50th	183 Dem 169 Dem	140 Rep 152 Rep	<b>43 Rep</b> <b>39 Rep</b>	<b>34 Dem</b> <b>37 Dem</b>
1889–1893	<b>Benjamin Harrison</b> Levi P. Morton	Republican	51st 52d	166 Rep <b>235 Dem</b>	159 Dem <b>88 Rep</b>	39 Rep 47 Rep	37 Dem 39 Dem
1893–1897	<b>Grover Cleveland</b> Adlai E. Stevenson	Democrat	53d 54th	218 Dem <b>244 Rep</b>	127 Rep <b>105 Dem</b>	44 Dem <b>43 Rep</b>	38 Rep <b>39 Dem</b>
1897–1901	<b>William McKinley*</b> Garret A. Hobart (to 1901) Theodore Roosevelt (1901)	Republican	55th 56th	204 Rep 185 Rep	113 Rep 163 Rep	47 Rep 53 Rep	34 Dem 26 Dem
1901–1909	<b>Theodore Roosevelt</b> (VP vacant, 1901–1905) Charles W. Fairbanks (1905–1909)	Republican	57th 58th 59th 60th	197 Rep 208 Rep 250 Rep 222 Rep	151 Dem 178 Dem 136 Dem 164 Dem	55 Rep 57 Rep 57 Rep 61 Rep	31 Dem 33 Dem 33 Dem 31 Dem
1909–1913	<b>William Howard Taft</b> James S. Sherman	Republican	61st 62d	219 Rep <b>228 Dem</b>	172 Dem <b>161 Rep</b>	61 Rep 51 Rep	32 Dem 41 Dem
1913–1921	<b>Woodrow Wilson</b> Thomas R. Marshall	Democrat	63d 64th 65th <b>66th</b>	291 Dem 230 Dem 216 Dem <b>240 Rep</b>	127 Rep 196 Rep 210 Rep <b>190 Dem</b>	51 Dem 56 Dem 53 Dem <b>49 Rep</b>	44 Rep 40 Rep 42 Rep <b>47 Dem</b>

\*Died in office.

Year	President and Vice President	Party of President	Congress	House		Senate	
				Majority Party	Minority Party	Majority Party	Minority Party
1921–1923	<b>Warren G. Harding*</b>	Republican	67th	301 Rep	131 Dem	59 Rep	37 Dem
	Calvin Coolidge						
1923–1929	<b>Calvin Coolidge</b>	Republican	68th	225 Rep	205 Dem	51 Rep	43 Dem
	(VP vacant, 1923–1925)		69th	247 Rep	183 Dem	56 Rep	39 Dem
	Charles G. Dawes (1925–1929)		70th	237 Rep	195 Dem	49 Rep	46 Dem
1929–1933	<b>Herbert Hoover</b>	Republican	71st	267 Rep	167 Dem	56 Rep	39 Dem
	Charles Curtis		72d	<b>220 Dem</b>	<b>214 Rep</b>	48 Rep	47 Dem
1933–1945	<b>Franklin D. Roosevelt*</b>	Democrat	73d	310 Dem	117 Rep	60 Dem	35 Rep
	John N. Garner (1933–1941)		74th	319 Dem	103 Rep	69 Dem	25 Rep
	Henry A. Wallace (1941–1945)		75th	331 Dem	89 Rep	76 Dem	16 Rep
			76th	261 Dem	164 Rep	69 Dem	23 Rep
			77th	268 Dem	162 Rep	66 Dem	28 Rep
	Harry S. Truman (1945)		78th	218 Dem	208 Rep	58 Dem	37 Rep
1945–1953	<b>Harry S. Truman</b>	Democrat	79th	242 Dem	190 Rep	56 Dem	38 Rep
	VP vacant, 1945–1949		80th	<b>245 Rep</b>	<b>188 Dem</b>	<b>51 Rep</b>	<b>45 Dem</b>
	Alben W. Barkley (1949–1953)		81st	263 Dem	171 Rep	54 Dem	42 Rep
			82d	234 Dem	199 Rep	49 Dem	47 Rep
1953–1961	<b>Dwight D. Eisenhower</b>	Republican	83d	221 Rep	211 Dem	48 Rep	47 Dem
	Richard M. Nixon		84th	<b>232 Dem</b>	<b>203 Rep</b>	<b>48 Dem</b>	<b>47 Rep</b>
			85th	<b>233 Dem</b>	<b>200 Rep</b>	<b>49 Dem</b>	<b>47 Rep</b>
			86th	<b>283 Dem</b>	<b>153 Rep</b>	<b>64 Dem</b>	<b>34 Rep</b>
1961–1963	<b>John F. Kennedy*</b>	Democrat	87th	263 Dem	174 Rep	65 Dem	35 Rep
	Lyndon B. Johnson						
1963–1969	<b>Lyndon B. Johnson</b>	Democrat	88th	258 Dem	177 Rep	67 Dem	33 Rep
	(VP vacant, 1963–1965)		89th	295 Dem	140 Rep	68 Dem	32 Rep
	Hubert H. Humphrey (1965–1969)		90th	247 Dem	187 Rep	64 Dem	36 Rep
1969–1974	<b>Richard M. Nixon†</b>	Republican	91st	<b>243 Dem</b>	<b>192 Rep</b>	<b>57 Dem</b>	<b>43 Rep</b>
	<i>Spiro T. Agnew<sup>††</sup></i>		92d	<b>254 Dem</b>	<b>180 Rep</b>	<b>54 Dem</b>	<b>44 Rep</b>
	<i>Gerald R. Ford<sup>§</sup></i>						
1974–1977	<b>Gerald R. Ford</b>	Republican	93d	<b>239 Dem</b>	<b>192 Rep</b>	<b>56 Dem</b>	<b>42 Rep</b>
	<i>Nelson A. Rockefeller</i>		94th	<b>291 Dem</b>	<b>144 Rep</b>	<b>60 Dem</b>	<b>37 Rep</b>
1977–1981	<b>Jimmy Carter</b>	Democrat	95th	292 Dem	143 Rep	61 Dem	38 Rep
	Walter Mondale		96th	276 Dem	157 Rep	58 Dem	41 Rep
1981–1989	<b>Ronald Reagan</b>	Republican	97th	<b>243 Dem</b>	<b>192 Rep</b>	53 Rep	46 Dem
	George Bush		98th	<b>269 Dem</b>	<b>165 Rep</b>	54 Rep	46 Dem
			99th	<b>253 Dem</b>	<b>182 Rep</b>	53 Rep	47 Dem
			100th	<b>257 Dem</b>	<b>178 Rep</b>	<b>54 Dem</b>	<b>46 Rep</b>
1989–1993	<b>George Bush</b>	Republican	101st	<b>262 Dem</b>	<b>173 Rep</b>	<b>55 Dem</b>	<b>45 Rep</b>
	Dan Quayle		102d	267 Dem	167 Rep	56 Dem	44 Rep

\*Died in office.



Year	President and Vice President	Party of President	Congress	House		Senate	
				Majority Party	Minority Party	Majority Party	Minority Party
1993–2000	<b>Bill Clinton</b> Albert Gore, Jr.	Democrat	103d	258 Dem	176 Rep	57 Dem	43 Rep
			104th	230 Rep	<b>204 Dem</b>	<b>53 Rep</b>	<b>47 Dem</b>
			105th	228 Rep	<b>206 Dem</b>	<b>55 Rep</b>	<b>45 Dem</b>
			106th	223 Rep	<b>211 Dem</b>	<b>54 Rep</b>	<b>46 Dem</b>
2000–2009	<b>George W. Bush</b> Dick Cheney	Republican	107th	220 Rep	215 Dem	50 Rep	50 Dem
			108th	229 Rep	204 Dem	51 Rep	48 Dem
			109th	233 Rep	206 Dem	55 Rep	44 Dem
			110th	<b>229 Dem</b>	<b>196 Rep</b>	<b>51 Dem</b>	<b>49 Rep</b>
2009–2017	<b>Barack Obama</b> Joe Biden	Democrat	111th	256 Dem	179 Rep	60 Dem	40 Rep
			112th	<b>193 Dem</b>	<b>242 Rep</b>	51 Dem	47 Rep
			113th**	<b>234 Rep</b>	<b>201 Dem</b>	45 Rep	53 Dem
			114th***	<b>274 Rep</b>	<b>186 Dem</b>	<b>54 Rep</b>	<b>44 Dem</b>
2017–2021	<b>Donald Trump</b> Michael Pence	Republican	115th****	<b>238 Rep</b>	<b>193 Dem</b>	<b>51 Rep</b>	<b>46 Dem</b>

<sup>†</sup>Resigned from the presidency. <sup>††</sup>Resigned from the vice presidency. <sup>§</sup>Appointed vice president. <sup>\*\*</sup>At the start of the 113th Congress, there were 2 vacancies in the House. There were also 2 Independents in the Senate that caucused with Democrats. <sup>\*\*\*</sup>In 2016, there were 2 vacancies in the House and two Independents in the Senate, both of whom were caucusing with the Democrats. <sup>\*\*\*\*</sup>These results are preliminary, and may differ slightly from the ultimate composition of the 115th Congress as it is seated in January.



# From Ideas to Policies

## IDEA

Legislators, interest groups, political parties, the public, and the media work to turn ideas into bills.



Legislators



Interest Groups



Political Parties



American Public



Media

## BILL

Legislators, parties, and the president turn bills into laws.



Legislators



Political Parties



President

## LAW

Laws determine policies, as implemented by bureaucracies and reviewed by courts. Many national policies are partially implemented by state/local government.



President



Bureaucracy



Courts



State and Local Governments

## POLICY

# Glossary

- 501(c)4 group** A social welfare organization that can devote no more than 50 percent of its funds to politics. Sometimes referred to as “dark money” groups because they do not have to disclose their donors.
- 527 organizations** Organizations under section 527 of the Internal Revenue Code that raise and spend money to advance political causes.
- Activist approach** The view that judges should discern the general principles underlying laws or the Constitution and apply them to modern circumstances.
- Ad hoc structure** Several subordinates, cabinet officers, and committees report directly to the president on different matters.
- Affirmative action** Laws or administrative regulations that require a business firm, government agency, labor union, school, college, or other organization to take positive steps to increase the number of African Americans, other minorities, or women in its membership.
- Agenda-setting or gatekeeping** The ability of the news media, by printing stories about some topics and not others, to shape the public agenda.
- Amicus curiae** A brief submitted by a “friend of the court.”
- Antifederalists** Those who favor a weaker national government.
- Appropriation** A legislative grant of money to finance a government program or agency.
- Articles of Confederation** A weak constitution that governed America during the Revolutionary War.
- Assistance program** A government program financed by general income taxes that provides benefits to poor citizens without requiring contributions from them.
- Australian ballot** A government-printed ballot of uniform dimensions to be cast in secret that many states adopted around 1890 to reduce voting fraud associated with party-printed ballots cast in public.
- Authority** The right to use power.
- Authorization legislation** Legislative permission to begin or continue a government program or agency.
- Benefit** A satisfaction that people believe they will enjoy if a policy is adopted.
- Bicameral legislature** A lawmaking body made up of two chambers or parts.
- Bill of attainder** A law that declares a person, without a trial, to be guilty of a crime.
- Bill of Rights** First 10 amendments to the Constitution.
- Bipolar world** A political landscape with two superpowers.
- Blog** A series, or log, of discussion items on a page of the World Wide Web.
- Brief** A written statement by an attorney that summarizes a case and the laws and rulings that support it.
- Bully pulpit** The president’s use of his prestige and visibility to guide or enthuse the American public.
- Bureaucracy** A large, complex organization composed of appointed officials.
- Bureaucratic view** View that the government is dominated by appointed officials.
- Cabinet** The heads of the 15 executive branch departments of the federal government.
- Categorical grants** Federal grants for specific purposes, such as building an airport.
- Caucus (Party Nomination)** A meeting of party followers in which party delegates are selected.
- Caucus (Congressional)** An association of congressional members created to advance a political ideology or a regional, ethnic, or economic interest.
- Checks and balances** Authority shared by three branches of government.
- Circular structure** Several of the president’s assistants report directly to him.
- Civil disobedience** Opposing a law one considers unjust by disobeying it peacefully and accepting the resultant punishment.
- Civil liberties** Rights—chiefly, rights to be free of government interference—accorded to an individual by the Constitution: free speech, free press, and so on.
- Civil rights** The rights of people to be treated without unreasonable or unconstitutional differences.
- Class view** View that the government is dominated by capitalists.
- Class-action suit** A case brought by someone to help both him-or herself and all others who are similarly situated.
- Clear-and-present-danger test** Law should not punish speech unless there was a clear and present danger of producing harmful actions.
- Client politics** A policy in which one small group benefits and almost everybody pays.
- Closed primary** A primary election where only registered party members may vote for the party’s nominee.
- Closed rule** An order from the House Rules Committee that sets a time limit on debate; forbids a bill from being amended on the floor.
- Cloture rule** A rule used by the Senate to end or limit debate.
- Coalition** An alliance of groups.
- Coattails** The alleged tendency of candidates to win more votes in an election because of the presence at the top of the ticket of a better-known candidate, such as the president.
- Committee clearance** The ability of a congressional committee to review and approve certain agency decisions in advance and without passing a law.



**Competitive service** The government offices to which people are appointed on the basis of merit, as ascertained by a written exam or by applying certain selection criteria.

**Concurrent powers** Powers shared by the national and state governments.

**Concurrent resolution** An expression of opinion without the force of law that requires the approval of both the House and the Senate, but not the president.

**Concurring opinion** A signed opinion in which one or more members agree with the majority view but for different reasons.

**Conditions of aid** Terms set by the national government that states must meet if they are to receive certain federal funds.

**Conference committee** Joint committees appointed to resolve differences in the Senate and House versions of the same bill.

**Congressional campaign committee** A party committee in Congress that provides funds to members and would-be members.

**Conservative coalition** An alliance between Republicans and conservative Democrats.

**Constitutional Convention** A meeting in Philadelphia in 1787 that produced a new constitution.

**Constitutional court** A federal court authorized by Article III of the Constitution that keeps judges in office during good behavior and prevents their salaries from being reduced. They are the Supreme Court (created by the Constitution) and appellate and district courts created by Congress.

**Containment** The belief that the United States should resist the expansion of aggressive nations, especially the former Soviet Union.

**Cooperative federalism** Idea that the federal and state governments share power in many policy areas.

**Cost** A burden that people believe they must bear if a policy is adopted.

**Cost overruns** When the money actually paid to military suppliers exceeds the estimated costs.

**Courts of appeals** Federal courts that hear appeals from district courts; no trials.

**Creedal passion view** View that morally impassioned elites drive important political changes.

**Critical or realignment periods** A period when a major, lasting shift occurs in the popular coalition supporting one or both parties.

**De facto segregation** Racial segregation that occurs in schools, not as a result of the law, but as a result of patterns of residential settlement.

**De jure segregation** Racial segregation that is required by law.

**Democracy** The rule of the many.

**Descriptive representation** when citizens are represented by elected officials from their same racial/ethnic background

**Devolution** The transfer of power from the national government to state and local governments.

**Direct or participatory democracy** A government in which all or most citizens participate directly.

**Discharge petition** A device by which any member of the House, after a committee has had the bill for 30 days, may petition to have it brought to the floor.

**Discretionary authority** The extent to which appointed bureaucrats can choose courses of action and make policies not spelled out in advance by laws.

**Disengagement** The belief that the United States was harmed by its war in Vietnam and so should avoid supposedly similar events.

**Dissenting opinion** A signed opinion in which one or more justices disagree with the majority view.

**District courts** The lowest federal courts; federal trials can be held only here.

**Diversity cases** Cases involving citizens of different states who can bring suit in federal courts.

**Divided government** One party controls the White House and another party controls one or both houses of Congress.

**Division vote** A congressional voting procedure in which members stand and are counted.

**Double tracking** A procedure to keep the Senate going during a filibuster in which the disputed bill is shelved temporarily so that the Senate can get on with other business.

**Dual federalism** Doctrine holding that the national government is supreme in its sphere, the states are supreme in theirs, and the two spheres should be kept separate.

**Due process of law** Denies the government the right, without due process, to deprive people of life, liberty, and property.

**Earmarks** "Hidden" congressional provisions that direct the federal government to fund specific projects or that exempt specific persons or groups from paying specific federal taxes or fees.

**Electoral college** The people chosen to cast each state's votes in a presidential election. Each state can cast one electoral vote for each senator and representative it has. The District of Columbia has three electoral votes, even though it cannot elect a representative or senator.

**Elite** Persons who possess a disproportionate share of some valued resource, such as money, prestige, or expertise.

**Entrepreneurial politics** A policy in which almost everybody benefits and a small group pays.

**Enumerated powers** Powers given to the national government alone.

**Equal protection of the laws** A standard of equal treatment that must be observed by the government.

**Equality of opportunity** Giving people an equal chance to succeed.

**Equality of results** Making certain that people achieve the same result.

**Establishment clause** First Amendment ban on laws "respecting an establishment of religion."

**Ex post facto law** A law that makes an act criminal even though the act was legal when it was committed.

**Exclusionary rule** Improperly gathered evidence may not be introduced in a criminal trial.

**Exit polls** Polls based on interviews conducted on election day with randomly selected voters.

**Faction** A group with a distinct political interest.

**Federalism** Government authority shared by national and local governments.

**Federalists** Those who favor a stronger national government.

**Federal-question cases** Cases concerning the Constitution, federal laws, or treaties.

**Fee shifting** A rule that allows a plaintiff to recover costs from the defendant if the plaintiff wins.

**Filibuster** An attempt to defeat a bill in the Senate by talking indefinitely, thus preventing the Senate from taking action on the bill.

**Framing** The way in which the news media, by focusing on some aspects of an issue, shapes how people view that issue.

**Franking privilege** The ability of members to mail letters to their constituents free of charge by substituting their facsimile signature for postage.

**Free rider problem** The tendency of individuals to avoid contributing to public goods.

**Freedom of expression** Right of people to speak, publish, and assemble.

**Freedom of religion** People shall be free to exercise their religion, and government may not establish a religion.

**Free-exercise clause** First Amendment requirement that law cannot prevent free exercise of religion.

**Game frame** The tendency of media to focus on political polls and strategy rather than on the issues.

**Gender gap** Difference in political views between men and women.

**Gerrymandering** Drawing the boundaries of legislative districts in bizarre or unusual shapes to favor one party.

**Gold plating** The tendency of Pentagon officials to ask weapons contractors to meet excessively high requirements.

**Good faith exception** An error in gathering evidence sufficiently minor that it may be used in a trial.

**Government by proxy** Washington pays state and local governments and private groups to staff and administer federal programs.

**Grandfather clause** A clause in registration laws allowing people who do not meet registration requirements to vote if they or their ancestors had voted before 1867.

**Grants-in-aid** Money given by the national government to the states.

**Grassroots lobbying** Using the general public (rather than lobbyists) to contact government officials about a public policy.

**Great Compromise** Plan to have a popularly elected House based on state population and a state-selected Senate, with two members for each state.

**Gridlock** The inability of the government to act because rival parties control different parts of the government.

**Habeas corpus** An order to produce an arrested person before a judge.

**Horse-race (scorekeeper) journalism** News coverage that focuses on who is ahead rather than on the issues.

**Human rights** The belief that we should try to improve the lives of people in other countries.

**Impeachment** Charges against a president approved by a majority of the House of Representatives.

**Impressionable years hypothesis** Argument that political experiences during the late teens and early 20s powerfully shape attitudes for the rest of the life cycle.

**In forma pauperis** A method whereby a poor person can have his or her case heard in federal court without charge.

**Incumbency advantage** The tendency of incumbents to do better than otherwise similar challengers, especially in congressional elections.

**Incumbent** The person already holding an elective office.

**Independent expenditures** Spending by political action committees, corporations, or labor unions to help a party or candidate but done independently of them.

**Inevitable discovery** The police can use evidence if inevitably it would have been discovered.

**Initiative** Process that permits voters to put legislative measures directly on the ballot.

**Insurance program** A self-financing government program based on contributions that provide benefits to unemployed or retired persons.

**Interest group** An organization of people sharing a common interest or goal that seeks to influence public policy.

**Interest group politics** A policy in which one small group benefits and another small group pays.

**Invisible primary** Process by which candidates try to attract the support of key party leaders before the election begins.

**Iron triangle** A close relationship between an agency, a congressional committee, and an interest group.

**Isolationism** The belief that the United States should withdraw from world affairs.

**Issue** A conflict, real or apparent, between the interests, ideas, or beliefs of different citizens.

**Issue network** A network of people in Washington, D.C.-based interest groups, on congressional staffs, in universities and think tanks, and in the mass media, who regularly discuss and advocate public policies.

**Joint committees** Committees on which both senators and representatives serve.

**Joint resolution** A formal expression of congressional opinion that must be approved by both houses of Congress and by the president; constitutional amendments need not be signed by the president.

**Judicial restraint approach** The view that judges should decide cases strictly on the basis of the language of the laws and the Constitution.

**Judicial review** The power of courts to declare laws unconstitutional.

**Laboratories of democracy** Idea that different states can implement different policies, and the successful ones will spread.

**Laissez-faire** An economic theory that government should not regulate or interfere with commerce.

**Legislative courts** Courts created by Congress for specialized purposes whose judges do not enjoy the protections of Article III of the Constitution.

**Legislative veto** The authority of Congress to block a presidential action after it has taken place. The Supreme Court has held that Congress does not have this power.

**Legitimacy** Political authority conferred by law or by a state or national constitution.

**Libel** Writing that falsely injures another person.

**Line-item veto** An executive's ability to block a particular provision in a bill passed by the legislature.

**Literacy test** A requirement that citizens show that they can read before registering to vote.

**Litmus test** An examination of the political ideology of a nominated judge.

**Log-rolling** A legislator supports a proposal favored by another in return for support of his or hers.

**Majoritarian politics** A policy in which almost everybody benefits and almost everybody pays.

**Majority leader** The legislative leader elected by party members holding the majority of seats in the House or the Senate.

**Majority-minority districts** Congressional district where a majority of voters are racial/ethnic minorities.

**Mandates** Terms set by the national government that states must meet whether or not they accept federal grants.

**Marginal districts** Political districts in which candidates elected to the House of Representatives win in close elections, typically by less than 55 percent of the vote.

**Material incentives** Money or things valued in monetary terms.

**Means test** An income qualification program that determines whether one is eligible for benefits under government programs reserved for lower-income groups.

**Media** Sources of news and information that have the potential to influence public opinion.

**Military-industrial complex** An alleged alliance between military leaders and corporate leaders.

**Minority leader** The legislative leader elected by party members holding a minority of seats in the House or the Senate.

**Momentum** When a candidate wins (especially an upset win), s/he tends to do better than expected in future contests. Sometimes also called the bandwagon effect.

**Mugwumps or progressives** Republican Party faction of the 1890s to the 1910s, composed of reformers who opposed patronage.

**National chair** Day-to-day party manager elected by the national committee.

**National committee** Delegates who run party affairs between national conventions.

**National convention** A meeting of party delegates held every four years.

**“Necessary and proper” clause** Section of the Constitution that allows Congress to pass all laws “necessary and proper” to its duties, and has permitted Congress to exercise powers not specifically given to it (enumerated) by the Constitution.

**New Jersey Plan** Proposal to create a weak national government.

**Nullification** The doctrine that a state can declare null and void a federal law that, in the state's opinion, violates the Constitution.

**Open primary** A primary election where all voters (regardless of party membership) may vote for the party's nominee.

**Open rule** An order from the House Rules Committee that permits a bill to be amended on the floor.

**Opinion of the Court** A signed opinion of a majority of the Supreme Court.

**Partisan identification** A voter's long-term, stable attachment to one of the political parties.

**Partisan polarization** A vote in which a majority of Democratic legislators opposes a majority of Republican legislators.

**Partisanship** An individual's identification with a party; whether they consider themselves a Democrat, Republican, or Independent.

**Partisanship** Another name for partisan identity.

**Party sorting** The alignment of partisanship and issue positions so that Democrats tend to take more liberal positions and Republicans tend to take more conservative ones.

**Party vote** There are two measures of such voting. By the stricter measure, a party vote occurs when 90 percent or more of the Democrats in either house of Congress vote together against 90 percent or more of the Republicans. A looser measure counts as a party vote in any case where at least 50 percent of the Democrats vote together against at least 50 percent of the Republicans.

**Per curiam opinion** A brief, unsigned court opinion.

**Plaintiff** The party that initiates a lawsuit.

**Pluralist view** View that competition among all affected interests shapes public policy.

**Plurality system** An electoral system in which the winner is the person who gets the most votes, even if he or she does not receive a majority; used in almost all American elections.

**Pocket veto** A bill fails to become law because the president did not sign it within 10 days before Congress adjourns.

**Polarization** A deep and wide conflict over some government policy.

**Police powers** State power to effect laws promoting health, safety, and morals.

**Policy entrepreneurs** Activists in or out of government who pull together a political majority on behalf of unorganized interests.

**Political action committee (PAC)** A committee set up by a corporation, labor union, or interest group that raises and spends campaign money from voluntary donations.

**Political agenda** Issues that people believe require governmental action.

**Political cue** A signal telling a legislator what values are at stake in a vote, and how that issue fits into his or her own political views on party agenda.

**Political ideology** A more or less consistent set of beliefs about what policies government ought to pursue.

- Political machines** A party organization that recruits members by dispensing patronage.
- Political participation** The many different ways that people take part in politics and government.
- Political party** A group that seeks to elect candidates to public office.
- Political question** An issue the Supreme Court will allow the executive and legislative branches to decide.
- Political socialization** Process by which background traits influence one's political views.
- Politics** The activity by which an issue is agitated or settled.
- Poll** A survey of public opinion.
- Poll tax** A requirement that citizens pay a tax in order to register to vote.
- Pork-barrel legislation** Legislation that gives tangible benefits to constituents in several districts or states in the hope of winning their votes in return.
- Positional issues** An issue in which rival candidates have opposing views but that also divides the voters.
- Power** The ability of one person to get another person to act in accordance with the first person's intentions.
- Power elite view** View that the government is dominated by a few top leaders, most of whom are outside of government.
- Primary elections** An election held to determine the nominee from a particular party.
- Priming** The ability of the news media to influence the factors individuals use to evaluate political elites.
- Prior restraint** Censorship of a publication.
- Probable cause** Reasonable cause for issuing a search warrant or making an arrest; more than mere suspicion.
- Prospective voting** Voting for a candidate because you favor his or her ideas for handling issues.
- Public good** Something of value that all individuals share, whether or not they contribute to it (such as clean air or water).
- Public opinion** How people think or feel about particular things.
- Public safety exception** The police can question an *un-Mirandized* suspect if there is an urgent concern for public safety.
- Purposive incentive** A benefit that comes from serving a cause or principle.
- Pyramid structure** A president's subordinates report to him through a clear chain of command headed by a chief of staff.
- Question wording** The way in which survey questions are phrased, which influences how respondents answer them.
- Quorum** The minimum number of members who must be present for business to be conducted in Congress.
- Random sample** Method of selecting from a population in which each person has an equal probability of being selected.
- Ratings** Assessments of a representative's voting record on issues important to an interest group.
- Recall** Procedure whereby voters can remove an elected official from office.
- Red tape** Complex bureaucratic rules and procedures that must be followed to get something done.
- Referendum** Procedure enabling voters to reject a measure passed by the legislature.
- Remedy** A judicial order enforcing a right or redressing a wrong.
- Representative democracy** A government in which leaders make decisions by winning a competitive struggle for the popular vote.
- Republic** A government in which elected representatives make the decisions.
- Reserved powers** Powers given to the state government alone.
- Restrictive** An order from the House Rules Committee that permits certain kinds of amendments but not others to be made into a bill on the floor.
- Retrospective voting** Voting for a candidate because you like his or her past actions in office.
- Reverse discrimination** Using race or sex to give preferential treatment to some people.
- Riders** Amendments on matters unrelated to a bill that are added to an important bill so that they will "ride" to passage through the Congress. When a bill has many riders, it is called a Christmas-tree bill.
- Roll-call vote** A congressional voting procedure that consists of members answering "yea" or "nay" to their names.
- Safe districts** Districts in which incumbents win by margins of 55 percent or more.
- Sampling error** The difference between the results of random samples taken at the same time.
- Search warrant** A judge's order authorizing a search.
- Select committees** Congressional committees appointed for a limited time and purpose.
- Selective incorporation process** The process whereby the Court has applied most, but not all, parts of the Bill of Rights to the states.
- Separate-but-equal doctrine** The doctrine established in *Plessy v. Ferguson* (1896) that African Americans constitutionally could be kept in separate but equal facilities.
- Separation of powers** Constitutional authority is shared by three different branches of government.
- Shays's Rebellion** A 1787 rebellion in which ex-Revolutionary War soldiers attempted to prevent foreclosures of farms as a result of high interest rates and taxes.
- Signing statement** A presidential document that reveals what the president thinks of a new law and how it ought to be enforced.
- Simple resolution** An expression of opinion either in the House or Senate to settle procedural matters in either body.
- Social movement** A widely shared demand for change in some aspect of the social or political order.
- Soft money** Funds obtained by political parties that are spent on party activities, such as get-out-the-vote drives, but not on behalf of a specific candidate.
- Solidary incentives** The social rewards (sense of pleasure, status, or companionship) that lead people to join political organizations.
- Sound bite** A radio or video clip of someone speaking.
- Sovereign immunity** The rule that a citizen cannot sue the government without the government's consent.



**Speaker** The presiding officer of the House of Representatives and the leader of his or her party in the House.

**Standing** A legal rule stating who is authorized to start a lawsuit.

**Standing committees** Permanently established legislative committees that consider and are responsible for legislation within a certain subject area.

**Stare decisis** “Let the decision stand,” or allowing prior rulings to control the current case.

**Strict scrutiny** The standard by which “suspect classifications” are judged. To be upheld, such a classification must be related to a “compelling government interest,” be “narrowly tailored” to achieve that interest, and use the “least restrictive means” available.

**Substantive representation** ability of citizens to have policies that they favor enacted into law

**Super PAC** A group that raises and spends unlimited amounts of money from corporations, unions, and individuals but cannot coordinate its activities with campaigns in any way.

**Super-delegates** Party leaders and elected officials who become delegates to the national convention without having to run in primaries or caucuses.

**Surge and decline** The tendency for the president’s party to do better in presidential years when he is at the top of the ticket (the surge), but to do worse when he is not because many voters are less enthusiastic and stay home (the decline).

**Suspect classification** Classifications of people based on their race or ethnicity; laws so classifying people are subject to “strict scrutiny.”

**Symbolic speech** An act that conveys a political message.

**teller vote** A congressional voting procedure in which members pass between two tellers, the “yeas” first and the “nays” second.

**Trust funds** Funds for government programs collected and spent outside the regular government budget.

**Two-party system** An electoral system with two dominant parties that compete in national elections.

**Unalienable** A human right based on nature or God.

**Unified government** The same party controls the White House and both houses of Congress.

**Unipolar world** A political landscape with one superpower.

**Valence issue** An issue on which everyone agrees, but the question is whether or not the candidate embraces that view.

**Veto** Literally, “I forbid”: it refers to the power of a president to disapprove a bill; it may be overridden by a two-thirds vote of each house of Congress.

**Veto message** A message from the president to Congress stating that he will not sign a bill it has passed. Must be produced within 10 days of the bill’s passage.

**Virginia Plan** Proposal to create a strong national government.

**Voice vote** A congressional voting procedure in which members shout “yea” in approval or “nay” in disapproval, permitting members to vote quickly or anonymously on bills.

**Voter identification laws** Laws requiring citizens to show a government-issued photo ID in order to vote.

**Voting-age population (VAP)** Citizens who are eligible to vote after reaching the minimum age requirement.

**Voting-eligible population (VEP)** Citizens who have reached the minimum age to be eligible to vote, excluding those who are not legally permitted to cast a ballot.

**Waiver** A decision by an administrative agency granting some other part permission to violate a law or rule that would otherwise apply to it.

**“Wall of separation”** Court ruling that government cannot be involved with religion.

**Watchdog** The press’s role as an overseer of government officials to ensure they act in the public interest.

**Whip** A senator or representative who helps the party leader stay informed about what party members are thinking.

**White primary** The practice of keeping blacks from voting in the southern states’ primaries through arbitrary use of registration requirements and intimidation.

**Worldviews** A comprehensive opinion of how the United States should respond to world problems.

**Writ of certiorari** An order by a higher court directing a lower court to send up a case for review.

# Notes

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## Chapter 7

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## Chapter 8

### Elections and Campaigns

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